
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

WILLIAM HANLEY,

Appellant,

vs.

THE PACIFIC LIVE STOCK
COMPANY, a corporation,

Appellee.

TRANSCRIPT OF RECORD

On Appeal from the District Court of the United
States for the District of Oregon,
From the Decree entered August 3, 1915.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

WILLIAM HANLEY,

Appellant,

vs.

THE PACIFIC LIVE STOCK
COMPANY, a corporation,

Appellee.

TRANSCRIPT OF RECORD

On Appeal from the District Court of the United
States for the District of Oregon,
From the Decree entered August 3, 1915.

INDEX

	Page
Affidavit of John Gilcrest.....	14
Affidavit of W. D. Hanley.....	28
Answer	4
Appeal, Bond on	86
Appeal, Citation on	1
Appeal, Order designating record on.....	87
Appeal, Petition for	79
Assignment of Errors	82
Bill of Complaint, stipulation as to.....	2
Bond on Appeal.....	86
Certificate to Transcript.....	339
Citation on Appeal.....	1
Contempt, order to show cause for.....	26
Decree, original case, stipulation as to.....	2
Decree of August 3d, 1915.....	73
Defendant's Evidence	184
Defendant's Exhibits	314
Evidence	91
Exhibits:	
Defendant's Exhibit "A".....	314
"B".....	316
Plaintiff's Exhibit 4 (map).....	320
Gilcrest, John, Affidavit of.....	14
Hanley, William, Motion and Affidavit of.....	28
Map, Plaintiff's Exhibit 4.....	320
Motion of W. D. Hanley.....	28
Opinion on Order for Contempt.....	47

INDEX—Continued

~~INDEXES (Continued)~~

	Page
Opinion by Judge Bellinger.....	321
Opinion by Judge Bean.....	330
Order designating record on appeal.....	87
Order to show cause for contempt.....	26
Order permitting testimony to be reproduced in exact words of witnesses	90
Petition for appeal.....	79
Plaintiff's evidence	92
Plaintiff's Exhibit 4.....	320
Record on appeal, order designating.....	87
Stipulation as to original bill and decree.....	2

Witnesses for Plaintiff:

W. A. Griffing	92
Cross Examination	111
Redirect Examination	139
Edward F. Treadwell	141
Cross Examination	150
John Gilcrest	155
Cross Examination	162
Ben Newman	172
Cross Examination	175
Redirect Examination	184

Witnesses for Defendant:

William Hanley	184
Cross Examination	291
Redirect Examination	256
Recross Examination	262

INDEX—Continued

WITNESSES FOR DEFENDANT—(Continued)

	Page
Redirect Examination	263
Recalled	307
George McLaren	271
Cross Examination	280
John Ryan	283
Cross Examination	291
Redirect Examination	294
Recross Examination	295
Redirect Examination	295
Will McLaren	296
Cross Examination	299
Dave McLaren	299
Cross Examination	301
George W. Young.....	302
Cross Examination	303
Carey Thornburg	306
Cross Examination	306
Henry Luig, Cross Examination.....	309
Redirect Examination	312



*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

WILLIAM HANLEY,

Appellant,

vs.

PACIFIC LIVE STOCK COMPANY,

a corporation,

Appellee.

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD:

Mr. C. E. S. Wood,

Mr. ERSKINE WOOD, and

Mr. LIONEL R. WEBSTER,

Yeon Building, Portland, Oregon,

for the Appellant.

Mr. WIRT MINOR,

Spalding Building, Portland, Oregon, and

Mr. EDWARD F. TREADWELL,

No. 1323 Merchants Exchange Building,

San Francisco, California,

for the Appellee.

In the matter of the Contempt of William Hanley,
Henry Luig, George W. Young, Hull Hotchkiss,
Carey Thornburg, James Dalton, and Robert Hud-
speth and P. G. Smith.

CITATION ON APPEAL.

United States of America, District of Oregon—ss.

To Pacific Live Stock Company, a Corporation, and
Teal & Minor, and E. F. Treadwell, its attorneys,
Greeting:

Whereas, William Hanley has lately appealed to
the United States Circuit Court of Appeals for the
Ninth Circuit from a decree rendered August 3, 1915,
in the District Court of the United States for the Dis-
trict of Oregon, in your favor, and has given the security
required by law;

You are, therefore, hereby, cited and admonished to
be and appear before said United States Circuit Court
of Appeals for the Ninth Circuit, at San Francisco,
California, within thirty days from the date hereof, to
show cause, if any there be, why the said decree should
not be corrected, and speedy justice should not be done
to the parties in that behalf.

Given under my hand, at Portland, Oregon, in said District, this 20th day of August in the year of our Lord, one thousand, nine hundred and fifteen.

CHARLES E. WOLVERTON,
Judge.

Service admitted this 20th August, 1915.

WIRT MINOR,
of Solicitors for Complainant.

Filed August 21, 1915. G. H. Marsh, Clerk.

*In the District Court of the United States for the
District of Oregon.*

Be it remembered, that on the 3rd day of October, 1899, there was duly filed in the Circuit Court of the United States for the District of Oregon, a Bill of Complaint, and on Tuesday, 10th day of December, 1901, the same being the 55th Judicial day of the regular October Term of said Court; present the Honorable Charles B. Bellinger, United States District Judge, presiding, there was entered a Final Decree; and that on the 5th day of November, 1915, there was filed a Stipulation that said Bill of Complaint and Final Decree as printed in cause No. 2036 in the Circuit Court of Appeals for the Ninth Circuit may be used and considered in this appeal the same as if the said Complaint and Decree were printed in this record, which said stipulation is in words and figures as follows, to wit:

STIPULATION.

No. 2577.

*In the District Court of the United States for the
District of Oregon.*

PACIFIC LIVE STOCK COMPANY,

a Corporation,

Complainant,

vs.

W. D. HANLEY ET AL.,

Defendants,

and

HARRISON KELLY,

Intervenor.

In the matter of the contempt of William Hanley, Henry Luig, George W. Young, Hull Hotchkiss, Carey Thornburg, James Dalton, Robert Hudspeth and P. G. Smith.

Stipulated that the complaint and final decree in the above entitled cause, as printed in cause No. 2036 in the Circuit Court of Appeals, for the Ninth Circuit, and on file in the office of the Clerk of said Court, may be used and considered in this appeal of William Hanley from the decree adjudging him in contempt the same as

if said complaint and final decree were printed as a part of the record in this present appeal.

Dated October 5, 1915.

EDWARD F. TREADWELL,
Solicitor for Pacific Live Stock Company.

ERSKINE WOOD,
of Solicitors for William Hanley.

Filed November 5, 1915. G. H. Marsh, Clerk.

And, to wit, on the 26th day of February, 1900, there was duly filed in said Court, and cause and answer, the affirmative part of said answer being in words and figures as follows, to wit:

ANSWER.

*In the Circuit Court of the United States for the
District of Oregon.*

PACIFIC LIVE STOCK COMPANY,

a Corporation,

Complainant,

vs.

W. D. HANLEY AND OTHERS,

Defendants.

* * * * *

And this defendant further alleges that he is the owner and in the possession, use and occupancy of the

following described land in Harney county, Oregon: in township 23 south, range 31 east, Willamette meridian, all of sections 21 and 27, all of section 22 except the S $\frac{1}{2}$ of the SW $\frac{1}{4}$ and also the W $\frac{1}{2}$ of section 26, and that he is now, and at the beginning of this suit he was, in the possession, use and occupancy under lease from the owners thereof, of section 35, said township and range, and that under and by said lease he has the exclusive right to the possession, use and occupancy of the said lands for the period of more than two years from this time, and that he is now and was at the beginning of this suit in the exclusive possession, use and occupancy with the consent of the owner thereof, of sections 23 and 25, township and range aforesaid. That all of said lands lie upon and adjacent to the East fork of Silvies river, as the same is mentioned and described in the complainant's bill of complaint herein; a part of said land lying upon and adjacent to the East bank of said East fork of Silvies river aforesaid, and a part lying upon the west bank thereof. That all of said land is practically level, sloping slightly and gradually to the south and southeast, that the soil thereof will not produce anything without the use of a large quantity of water thereon for the irrigation thereof, but that with a sufficient quantity of water properly distributed over said land during the irrigating season, said land and the whole thereof will and does produce large and valuable crops of grasses each and every year and furnishes a large area of valuable pasturage. That from time immemorial, Silvies river, which rises and flows substantially as alleged in complainant's bill of complaint,

has been and still is a perennial stream, and each year the greater part of the waters thereof run down through said East fork thereof, to and upon the lands hereinbefore described and in the natural condition of the said water and said land, said water has each year covered almost all of said land during the irrigating season. That a large part of the said land in the natural condition of the same in relation to the said water, was submerged with said water each year to such a depth and for so long time as that no grass whatever grew or would grow thereon, and the same produced nothing but tule and flag and was of little or no value, and a small part of said land so lying upon and adjacent to said fork of said river as aforesaid was not ordinarily covered by the waters thereof. That in the year 1886, the defendant's predecessors in interest in said lands, for the purpose of distributing the waters of said branch of said river over and upon the lands not naturally overflowed thereby and of thus irrigating the same and of producing thereon large and valuable crops of the natural grasses thereof, and for the further purpose of preventing said water from flooding other parts of said land, thereby reclaiming the same so that it also would produce large crops of said grasses, placed a dam in said East fork of Silvies river in the NW $\frac{1}{4}$ of section 21 of the land above described and immediately thereafter dug and constructed a ditch leading out of said East fork of said river just above said dam and running around through said section 21, through and upon sections 22, 27 and the W $\frac{1}{2}$ of section 26 of the land above described, and diverted through said ditch under

six-inch pressure at least 1,000 inches of said waters, and in connection with said ditch and as a part of the plan for controlling and utilizing said water, and of controlling and utilizing the surface water which flows across said land when the water is high, they at the same time constructed a levee along that side of said ditch next to said fork of said river. That the said dam is the same mentioned in complainant's bill of complaint as being maintained by this defendant, and said ditch is one of the ditches therein designated as being maintained by him. That said dam is feet wide and feet high and said ditch is feet deep, feet wide on the top and feet wide on the bottom, and said ditch is built upon a grade of about 1/10 of an inch to the rod. Both said dam and said ditch have remained substantially as originally constructed, so far as affects the quantity of water taken from said fork of said river, and the method by which it is taken, ever since the same was originally constructed as aforesaid. Said dam was located and built, said ditch laid out and constructed, and said appropriation of water made under and pursuant to the local laws, rules, customs and regulations respecting the appropriation of water. That all of the water appropriated by and carried in said ditch which is taken from said East fork of said river as aforesaid, is necessary for the proper irrigation of the land covered by the said ditch, and this defendant and his predecessors in interest have so used said water to the extent and in the quantity aforesaid through said ditch upon said land for the irrigation thereof during the irrigating season of each and every year since the construction thereof and

the appropriation of the said water aforesaid which said use of said water has been at all times open, notorious, under claim and assertion of ownership and right and adverse to the complainant, its predecessors in interest and to all the world.

And this defendant alleges that the complainant and its predecessors in interest have known of the use of said water by this defendant and his predecessors in interest as aforesaid, and up to the time of the beginning of this suit no objection had ever been made thereto by said complainant, or its predecessors in interest. That although said dam and said ditch are now in purpose and effect the same as originally constructed as aforesaid, yet in order to maintain the same, it has been necessary, from time to time, to repair both said dam and said ditch, and in the year 1887 this defendant put in a new dam and repaired and cleaned out said ditch and expended a large sum of money.

That in the year 1896, the complainant entered into an agreement with this defendant and his predecessors in interest, that if they would extend said ditch until it reached the land of the complainant, namely, the SE $\frac{1}{4}$ of section 26, township 23 south, range 31 east, that it would assist in the construction thereof to said land, so that from thereon it would be enabled to continue said ditch onto and across its own land and for its own benefit and advantage. That pursuant to said agreement, this defendant and his predecessors in interest with the assistance of the complainant, extended said ditch down to the west line of said SE $\frac{1}{4}$ of section 26, and there-

upon said complainant continued the same onto and across said land and other of its lands. That the extension of said ditch, onto and across the complainant's said lands as aforesaid, effected the drainage and reclamation of a large tract of its land which had theretofore been too wet to produce crops and enabled it to irrigate other large tracts of its land, which without said irrigation was non-productive, whereby large tracts of its said land which otherwise would not and did not produce anything were made to and still do produce each year large and valuable crops of natural grasses. That ever since the extension of said ditch as aforesaid, the complainant has so used the same jointly with this defendant as aforesaid, and still so maintains and uses the same to its great and continued profit and advantage as aforesaid.

And this defendant further alleges that in the year 1897 he took out a small ditch above said dam on the west side of said East fork of Silvies river and extended the same down and parallel with the said river for a short distance onto section 27 aforesaid. Said ditch is feet deep, feet wide on the bottom and feet wide on the top, is constructed upon a grade of about $1/10$ of an inch to the rod and the water conveyed therein is used for the purpose of irrigating land lying upon and adjacent to the west bank of the East fork of Silvies river.

And this defendant further alleges that in the year 1895, he constructed a ditch leading out of said East fork of Silvies river, on the east side thereof in the N $1/2$

of section 27 above described and about one and one-half miles below the dam above mentioned, and extended the same in a southeasterly direction until it enters into and upon the lands of the complainant on or near the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of section 26, township 23 south, range 31 east. That said ditch is feet deep, feet wide on top, and feet wide on the bottom and is constructed upon a grade of about $\frac{1}{10}$ of an inch to the rod, and that the same was built to be used and is used by this defendant solely for the purpose of draining water from certain of his land as above described and was not intended to be used and never has been used by him for the purpose of irrigation. That there is no dam in connection with said ditch and that by draining the water off from his land through said ditch, he prevents a large tract thereof from being so submerged with water as to render it valueless, and that thereby he is enabled to and does reclaim a large body of his land, so that the same can and does produce abundant and valuable crops of wild grasses every year, which is used for hay and pasturage by this defendant. And this defendant alleges that said ditch was constructed by him with the knowledge, consent, and acquiescence and solicitation of the complainant; and that with the knowledge, assent, and acquiescence of said complainant, he expended large sums of money in the construction thereof. That not only does the said ditch accomplish the reclamation of a large amount of land for this defendant, as aforesaid, but in the same manner, by the same means, and with the like effect, it also reclaims a large amount of land belonging to said complainant. That not only did said

complainant know of, assent to and acquiesce in the construction of said ditch by this defendant as aforesaid, but encouraged and assisted him in the construction thereof; that said complainant requested him to construct said ditch down to and upon its land, namely, the SE $\frac{1}{4}$ of section 26 as aforesaid, and proposed and agreed with him that if he would do so, it would continue the construction thereof onto and through its lands, giving the water thereby to be conveyed an outlet and enabling it to use the same for the irrigation of certain of its lands not otherwise subject to irrigation, and thereby gaining to itself not only the advantage of drainage as aforesaid, but of irrigation also. That pursuant to such proposal and agreement, and relying thereon, this defendant, at great trouble and large expense to himself as aforesaid, did construct said ditch as aforesaid, down to and upon the lands of said complainant as aforesaid, and said complainant complied with and carried out its said proposal and agreement and continued said ditch down to, upon and across its said land as it had proposed and agreed to do as aforesaid, and ever since has used and still uses said ditch in conjunction with this defendant as aforesaid and has been and still is greatly benefitted thereby.

And this defendant alleges that he uses all of the land so owned and occupied by him as aforesaid each year for the raising of the natural grasses thereon, a part of which is annually cut and cured for hay and the remainder thereof is used for the pasturing of cattle and other live stock. That by the use of the water thereon for irrigation as aforesaid and by the removal of surplus

water therefrom as hereinbefore alleged, he is enabled to produce and does produce large and valuable crops thereon each year as aforesaid. That the irrigating season for said lands extends from the first day of April to the first day of July of each year and that during such time he needs for the irrigation of said lands two thousand five hundred inches of water flowing under a six-inch pressure. That during the irrigating season, as aforesaid, that amount of water has been used for the purpose of raising, caring for, breeding and fattening cattle, and large herds thereof have annually been so raised, cared for, fed and fattened on said land with the hay and pasturage raised and produced thereon, as aforesaid, and this defendant now uses said land and the hay and pasturage raised thereon in the same manner and for the same purpose, and in addition thereto he sells large quantities of the hay produced thereon and by these means he is enabled to and does realize each year a large annual income therefrom. That by the use of the waters of the East fork of Silvies river upon said land in the manner and to the extent hereinbefore and shown, said land is of great value and produces for him a large income as aforesaid, but without the use of said water as aforesaid said land will be of little or no value and no income could be realized therefrom.

And this defendant further alleges that the use of said water by him in the manner and to the extent aforesaid does not deprive complainant of any water which it would otherwise receive nor does it in the least hinder or embarrass it in the use thereof, but on the contrary, more water is sent down upon its land where water is

needed, and a large tract of land which is too wet is drained and put in condition to produce valuable crops as aforesaid, and if said dam was removed and said ditches destroyed, the complainant would be injured instead of benefited thereby. All of which matters and things, this defendant is ready and willing to maintain and prove, as this honorable court shall direct; and he prays to be hence dismissed with his reasonable costs and charges, in this behalf sustained and incurred.

LIONEL R. WEBSTER,
BIGGS & TURNER,
Solicitors for Defendant.

State of Oregon, Multnomah County—ss.

Due and legal service of the foregoing answer is hereby accepted, and receipt of certified copy thereof admitted at Portland, Oregon, February 26, 1900.

L. B. COX,
Solicitor for Complainant.

U. S. Circuit Court, District of Oregon, filed Feb. 26,
1900. J. A. Sladen, Clerk.

And afterwards, to wit, on the 29th day of April, 1915, there was duly filed in said Court, and cause an affidavit of John Gilcrest in words and figures, as follows, to wit;

AFFIDAVIT OF JOHN GILCREST.

*In the Circuit Court of the United States for the
District of Oregon.*

PACIFIC LIVE STOCK COMPANY (a corporation),
Complainant,

vs.

W. D. HANLEY, F. L. MACE, H. C. LEVENS, GEORGE
WHITING, THOMAS WHITING, IONE WHITING, JOHN
C. FOLEY, N. BROWN, J. H. BYERLY, C. P. RUTH-
ERFORD, C. A. SWEET, M. CUSHING, D. M. McMEN-
AMY, JOHN I. NEWMAN, CHARLES NELSON, W. H.
MARRS, MANNA MARRS, JOSEPH T. BARNES, WIL-
LIAM CLARK, C. H. VOEGTLY, GEORGE W. YOUNG,
MRS. A. E. YOUNG, P. G. SMITH, GREEN HUDSPETH,
JAMES DALTON, HULL HOTCHKISS, CASPAR LUIG,
MRS. F. E. MCGEE, PETER CLEMENS, B. R. PORTER,
and THE HARNEY VALLEY DAM, DITCH AND IRRIG-
ATING COMPANY, (a corporation),

Defendants.

and

HARRISON KELLEY,

Intervenor.

NUMBER 2577.

In the matter of the contempt of William Hanley,
Henry Luig, George W. Young, Hull Hotchkiss,
Carey Thornburg, James Dalton and Robert Hud-
speth and P. G. Smith.

State of Oregon,

County of Harney—ss.

John Gilcrest, being first duly sworn, deposes and says that he is superintendent of the Pacific Live Stock Company, complainant in the above entitled suit, and has been such at all times herein mentioned;

That on the tenth day of December, 1901, this Court duly gave, made and entered its final decree in the above entitled suit, which final decree has never been appealed from, modified, vacated or set aside, and is still in full force and effect, and all of the defendants in the said suit and all of the persons above mentioned have at all times had notice and knowledge of the said decree and of all of the terms and provisions thereof;

That by the terms of the said decree all of the defendants in said suit, their servants, agents and attorneys, and all persons claiming by, through or under them, were, and each of them was enjoined and restrained from interfering with, obstructing or diverting any of the waters of Silvies River or the East or West fork thereof except in the manner and at the times expressly permitted and provided for in and by the said decree, and were enjoined and required to remove all dams and obstructions in the said stream, except such dams and obstructions as were expressly provided for in and by the said decree; that since the entry of said decree Carey Thornburg succeeded to the land and water rights owned by C. H. Voegtly at the time of said decree;

That since the entry of the said decree, the defendant Caspar Luig died and Henry Luig has succeeded

to all of the land owned by him at the time of the said decree, and has been in possession of the same and of the Luig Dam mentioned in the said decree, and has at all times had knowledge and notice of the said decree and of the terms thereof;

That since the entry of the said decree, the defendant Green Hudspeth died and Robert Hudspeth, as one of the heirs of the said Green Hudspeth, has been in the possession of the said property of Green Hudspeth and the works used for the irrigation thereof, and has had knowledge of all of the terms of the said decree;

That the general purpose of the said decree was to permit the flood water of Silvies River, which generally occurs during the months of March and April, to flow unobstructed through the said river to the lands of Complainant until on or about the 12th day of May each year, after which time the defendants in said action were to have the use of the said water in the manner provided by the terms of said decree;

That generally the flood water of the said river during the said months, is as high as 1200 to 1500 cu. ft. per second, but in the year 1915, owing to the light fall of snow, the flow of said river during said months, has been exceedingly low, and the water thereof has scarcely been out of the natural banks of the said river except when artificially diverted, and the flow of the said river during the said months has been between 300 and 600 feet per second;

That the snow in the mountains has been largely melted and the entire prospect is that there will be no

high flow of the water of the Silvies River during the said year 1915, all of which is known by the parties above named and generally in the said community; and unless the said complainant receives water during the period before the 12th day of May, 1915, it will receive little, if any, water from said river during said year;

That for the purpose of depriving said complainant of the said water to which it is entitled by the terms of said decree, the said defendants and parties above mentioned, to wit, William Hanley, Henry Luig, George W. Young, Hull Hotchkiss, James Dalton and Carey Thornburg, in violation of the terms of the said decree, have conspired together to take the water of the said river and have during the months of March and April, 1915, totally disregarded the terms of the said decree and obstructed the said water and the channel of the said river and the East and West forks thereof, and have taken and diverted the water of the said river above the lands of complainant so as to prevent the same from flowing to the lands of the complainant, and during the said period and while the average flow of the said river was about 450 cu. ft. per second, the said defendants have diverted far in excess of 300 cu. ft. per second of the waters of the said river, and in this behalf the said affiant shows;

I.

That in and by the terms of the said decree the defendant Luig was permitted to maintain one dam in Silvies River in Sec. 31, Twp. 23 S., Range 31 E, from

the 15th day of May until the first day of July of each year and not otherwise, and was required to remove all of the boards from said dam during the balance of said year; That notwithstanding the said decree and in violation and contempt thereof, the said Henry Luig, in the month of April, 1915, completely closed the said dam by putting the boards therein and by means thereof obstructed the water in the West fork of Silvies River and backed the same up the channel of the said river and by means thereof diverted in excess of 40 cu. ft. of water of the said river and being all of the water of the said West fork flowing at said dam except about 4 second feet; and that the said defendant William Hanley encouraged, advised and assisted said Henry Luig in the acts aforesaid and in the contempt and violation of the said decree as aforesaid;

II.

That by the terms of the said decree the defendant George W. Young and the defendants Hull Hotchkiss and C. H. Voegtly were permitted to maintain one dam in the West fork of Silvies River, which was then situated in the NE $\frac{1}{4}$ of Sec. 30, Twp. 23 S., Range 31 E., about a quarter of a mile south of the north line of the said Section 30, together with the ditches connected therewith, and were permitted to close and use the said dam from the 12th day of May to the first day of July of each year, and at no other times, and were enjoined and restrained from maintaining any other dam in the said river; That notwithstanding the premises, several years ago the said dam was washed out and thereupon

the said defendant George W. Young and the said Hull Hotchkiss and the said Carey Thornburg, in violation and contempt of the terms of the said decree, constructed a new dam about a quarter of a mile up stream from the location of the said dam permitted by said decree, and constructed the same with a permanent board across the floor thereof, which raised the water in said stream at all times about a foot and a quarter, and have ever since maintained the said dam and have also constructed a new ditch taken out of the said river above the said dam and leading onto the lands of the said Young, Hotchkiss and Thornburg, and during the month of April, 1915, the said defendants, by means of the said dam and ditch, diverted water into the same for a long period of time, in excess of 2 cu. ft. per second and carried the same away from the said river and to the said lands; That at the time aforesaid the water in the said river would not naturally flow into the head of the old ditch on said property, but the bottom of the said old ditch was almost two feet above the water naturally flowing in the said river when unobstructed by said new dam, and all of the said water was diverted by reason of the said new dam and in violation of the terms and provisions of the said decree, and the said water has been permitted by the said defendants to flow down a large ditch 12 feet in width, on two sides of the County Road, and there to stand and seep into and upon their lands and to flow over the same, and in all the acts aforesaid the said defendants have been acting under the advice and encouragement and with the assistance of the said defendant William Hanley;

That heretofore this honorable Court adjudged that the said defendant George W. Young had violated the terms of the said decree by constructing the dam aforesaid, but was permitted by this honorable Court to purge himself of contempt by paying the costs of said contempt proceedings and by removing the said dam, but the said defendant, Young, has not purged himself of said contempt and has not paid the costs of said proceedings, or removed the said dam, but in continued violation of the said decree and in willful contempt thereof has continued to maintain the said dam and ditches aforesaid;

III.

That long prior to the entry of said decree, there was a dam belonging to the defendant Hull Hotchkiss and C. H. Voegtly situated near the south line of the said Sec. 30, but for a considerable time prior to the entry of the said decree, the said parties had not used the said dam, but had used the dam mentioned by the said decree as the Young dam situated in the NE $\frac{1}{4}$ of said Sec. 30, and by the terms of the said decree, the defendants Hotchkiss and Voegtly were enjoined and restrained from using the said Voegtly dam, near the south line of Sec. 30, but were permitted to maintain and use the said Young dam, on the NE $\frac{1}{4}$ of Sec. 30; that since the entry of the said decree, the skeleton of the said Voegtly dam has remained in the said river, but has never been used and has not materially obstructed the said river during the irrigating season, until the year 1914, at which time the said Carey Thornburg and Hull Hotchkiss placed some hay and manure in the said dam, which was torn out by this affiant; That notwithstand-

ing the terms of the said decree and in willful violation thereof, the said Hull Hotchkiss and Carey Thornburg, in the year 1915 and particularly in the month of April, placed a large amount of timbers, boards and other material in the skeleton of said Voegtly dam, and by means thereof have obstructed and raised the water in the West fork of the said river in its flow to complainant, and have ever since and still are maintaining the boards in the said dam, and in doing so are assisted, advised and encouraged by the said defendant, William Hanley, all in willful contempt and violation of the terms of the said decree;

IV.

That notwithstanding the terms of the decree and the facts aforesaid, in the fall of 1914 and in the spring of 1915, the said defendants P. G. Smith and the said Carey Thornburg constructed a new wooden and rock dam in the said West fork of Silvies river, immediately above the said Voegtly dam, and extending clear across the said river; That the said old Voegtly dam was 28 feet in width, extending clear across the channel of the said river, and was constructed of wood with openings totaling $23\frac{1}{2}$ feet in the clear; That the said new dam is constructed of wood of a total width of only 16.4 feet across said stream and with openings totaling only 12.3 feet in the clear; That the balance of the said dam across the said stream and being about 12 feet in width, consists of a solid rock dam acting as a permanent obstruction to the free flow of the water of said river and the floor of the said new dam is 1.2 feet higher than the floor of the

old dam, and at the present time the said new dam and old dam are raising the water of said river in excess of one foot in the channel thereof, and the said defendants have threatened to continue to maintain the said dam and to put further boards and obstructions therein, and in all the acts aforesaid, the said P. G. Smith and Carey Thornburg have been acting with the assistance, advice and encouragement of the said William Hanley and in willful contempt and violation of the terms of the said decree;

V.

That in and by the terms of the said decree, the said defendant William Hanley was enjoined and restrained from using a certain ditch except for the purpose of draining water from the surface of his land; That during the months of March and April, 1915, it was unnecessary to drain water from the said land of the defendant William Hanley, but on the contrary, the same was the irrigation season during which the said defendant William Hanley was attempting to put water on the said land for the irrigation thereof, and notwithstanding the terms of the decree, and in willful contempt and violation thereof the said defendant, during a long period in the months of March and April, had the head of the said drain ditch open, and by means thereof was diverting from the East Fork of Silvies river in excess of 30 sec. ft. of water of the said river and using the same for the irrigation of his land;

That in and by the terms of said decree, the said William Hanley was permitted to maintain a certain

dam known as the 21 dam, but was enjoined from obstructing the water of said river by means thereof prior to the 5th day of May of each year, but notwithstanding the premises, and during the year 1915, during the months of March and April thereof, the said defendant William Hanley placed and maintained one board part way across the said dam and permitted and suffered a large amount of brush and debris to gather above the said dam, which raised the water of the said river at least one foot higher than the floor of the said dam, and by means thereof diverted into the said Hanley upper ditch, referred to in said decree, in excess of 40 cu. ft. per second, all in willful contempt and violation of the terms of said decree;

That in and by the terms of the said decree, the said William Hanley was enjoined and restrained from in any manner obstructing the channel of Silvies river prior to the 5th day of May each year, and was also enjoined and restrained from diverting any water therefrom except as would naturally flow through the Upper Hanley ditch, but notwithstanding the premises, and during the months of March and April, 1915, the said defendant William Hanley, in willful contempt and violation of the said decree, made the following diversions by means of cuts in the banks of the said river on his land described in said decree, to-wit, In the left bank of the East fork of Silvies river about 900 feet below the Hanley drain ditch, a cut in the bank of said river about 12 feet in width and 3 feet in depth, diverting about 50 sec. ft. of water from said river; a cut in the left bank of said river about 1000 feet above the south

line of Sec. 27, Twp. 23 S., Range 31 E., diverting about 6 sec. ft. of water of said river; besides the foregoing, the said defendant Hanley diverted a large quantity of water through numerous smaller cuts in said river through said Sec. 27 and aided the diversion of water through the same as well as the cuts aforementioned, in the following manner: The said channel of Silvies river through the said Sec. 27 and through Sec. 35, in the said Twp., is small and sluggish and easily obstructed, and the said defendant Hanley, in willful violation and contempt of the terms of the said decree, has, during the months of March and April, 1915, further obstructed the channel of said river by maintaining therein on Sec. 27, the timbers of an old bridge which has been destroyed, across the said river, and which timbers have been permitted to fall and lodge in the said river, and also by maintaining another bridge over the said river, the stringers of which are set into and below the banks of said river and so that the same obstructs the flow of water of the said river and the said defendant also permits to accumulate in the channel of said river and to be caught by said bridges, and timbers, the carcasses of dead cattle and hogs and also other material which has obstructed the channel of the said river and prevented the water thereof from flowing down the same and which assisted it to flow over the banks and out of the low places along the banks of said river and also through the cuts in the banks aforesaid; and by means thereof, the said defendant has diverted about 75 sec. ft. of water from the said river on the West side in addition to the water aforesaid, and all of said acts of the said defendant

have been in willful violation of the terms of the said decree;

VI.

That in and by the terms of the said decree, the defendants Green Hudspeth, James Dalton and the intervenor, Harrison Kelly, were permitted to maintain a dam and ditch generally referred to as the People's ditch and dam, in Sec. 31, Twp. 23 S., Range 31 E., and were permitted to divert a certain amount of water by means thereof for irrigation from the 12th day of May until the first day of July of each year, and not otherwise; That notwithstanding the premises, during the month of April, 1915, the said Robert Hudspeth and the said James Dalton, in contempt and violation of the said decree, permitted and suffered the said head-gate in the said ditch to be and remain open and by means thereof have diverted between 4 and 5 sec. ft. of water of the said river and carried the same through the said ditch and away from the West fork of the said river, all of which is done in willful contempt and violation of the terms of said decree.

Wherefore, the said Complainant asks that an order to show cause be issued, and that the said defendants be dealt with in such manner as may be meet in the premises.

JOHN GILCREST.

Subscribed and sworn to before me this 26th day of April, 1915.

R. T. Hughet, Clerk.

(Seal.)

By Walter G. Struck, Deputy.

Filed April 29, 1915.

G. H. Marsh, Clerk.

And afterwards, to wit, on Tuesday, the 29th day of April, 1915, the same being the 53rd Judicial day of the regular March, 1915, term of said Court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER TO SHOW CAUSE.

*In the District Court of the United States for the
District of Oregon.*

No. 2577

PACIFIC LIVE STOCK COMPANY (a corporation),
Complainant,

W. D. HANLEY, F. L. MACE, H. C. LEVENS, GEORGE
WHITING, THOMAS WHITING, IONE WHITING, JOHN
C. FOLEY, N. BROWN, J. H. BYERLY, C. P. RUTH-
ERFORD, C. A. SWEET, M. CUSHING, D. M. McMEN-
AMY, JOHN I. NEWMAN, CHARLES NELSON, W. H.
MARRS, MANNA MARRS, JOSEPH T. BARNES, WIL-
LIAM CLARK, C. H. VOEGTLY, GEORGE W. YOUNG,
MRS. A. E. YOUNG, P. G. SMITH, GREEN HUDSPETH,
JAMES DALTON, HULL HOTCHKISS, CASPAR LUIG,
MRS. F. E. MCGEE, PETER CLEMENS, B. R. PORTER,
and THE HARNEY VALLEY DAM, DITCH AND IRRIGATING COMPANY, (a corporation),

Defendants.

and
HARRISON KELLEY,

Intervenor.

In the matter of the contempt of William Hanley, Henry Luig, George W. Young, Hull Hotchkiss, Carey Thornburg, James Dalton and Robert Hudspeth and P. G. Smith.

ORDER TO SHOW CAUSE.

Upon reading the affidavit of John Gilcrest in the above entitled cause and good cause appearing therefor, it is hereby ordered that William Hanley, Henry Luig, George W. Young, Hull Hotchkiss, Carey Thornburg, James Dalton, Robert Hudspeth and P. G. Smith be and appear before this court in the court room thereof in the city of Portland, State of Oregon, on the 7th day of May, 1915, at the hour of ten o'clock A. M. and then and there show cause, if any they have, why they and each of them should not be punished for contempt of said court for violation of the provisions of the final decree made and entered in said cause on the 10th day of December, 1901; and it is further

Ordered that this order to show cause may be served by William Austin Goodman, Sheriff of Harney County, or his deputy.

Dated this 29th day of April, 1915.

CHAS. E. WOLVERTON,
District Judge.

RETURN ON SERVICE OF WRIT.

United States of America, District of Oregon—ss.

I hereby certify and return that I served the annexed order to show cause on the therein named W. D. Hanley, by handing to and leaving a true and correct copy thereof, together with the copy of the affidavit, with him personally at Portland, in said District, on the 29th day of April, A. D. 1915.

JOHN MONTAG,

U. S. Marshal.

By LEONARD BECKER,

Deputy.

Filed April 29, 1915.

G. H. Marsh, Clerk.

And afterwards, to wit, on the 6th day of May, 1915, there was duly filed in said Court and cause a motion and affidavit of William Hanley in words and figures as follows, to wit:

**MOTION AND AFFIDAVIT OF WILLIAM
HANLEY.**

*In the District Court of the United States for the
District of Oregon.*

In the Cause entitled:

*In the Circuit Court of the United States for the
District of Oregon.*

PACIFIC LIVE STOCK COMPANY,

a Corporation,

Complainant,

vs.

W. D. HANLEY, F. L. MACE, H. C. LEVENS,

ET AL.,

Defendants,

and

HARRISON KELLEY,

Intervenor.

Number 2577.

In the matter of the contempt of William Hanley, Henry Luig, George W. Young, Hull Hotchkiss, Carey Thornburg, James Dalton and Robert Hudspeth and P. G. Smith.

Now comes William Hanley, by C. E. S. Wood and Erskine Wood, of Wood, Montague & Hunt, and Lionel R. Webster, of Emmons & Webster, and moves the court for an order discharging the rule to show cause why he should not be punished for contempt; and in support of said motion refers to the affidavit of said William Hanley as follows:

United States of America, District of Oregon—ss.

I, William Hanley, first being duly sworn according to law, say that I am the same W. D. Hanley, a party defendant in the above entitled cause.

I have been advised by counsel learned in the law that the decree entered in the above entitled cause and referred to in the affidavit of John Gilcrest in this proceeding applies only to the parties defendant in the said original suit, or their privies or successors in interest, and only to those lands described in the complaint and in said decree, and that said decree has no application to lands which were not described in said complaint and decree and the water-rights to which were considered in said suit.

The flow in the river for the spring of 1915 was not so high as usual, but I am not prepared to state what is the general average flow; the United States Government has been making observations for the purpose of determining this fact, but my understanding is they have not continued sufficiently long to determine any conclusion. It is not true that the water of the river has not been out of its natural banks during this season except when artificially diverted. I cannot say whether the flow of the river has been between 300 and 600 cubic feet per second. I cannot say whether the snow in the mountains has already been largely melted, but I believe the flow of Silvies river during this year will not be as abundant and the river will not be as high as usual, but if the complainant does not receive sufficient water for its purpose either before or after the twelfth of May, it will be by reason of its own acts combined with the natural shortage at this season.

I deny that I have conspired with Henry Luig, George W. Young, Hull Hotchkiss, James Dalton and

Carey Thornburg, or any or either of them, to take the water of said river, or in any way to violate the terms of said decree. I deny that I have directly or indirectly disregarded the terms of said decree or obstructed the water in the channel of said river or diverted the water or the river above the lands of the complainant so as to prevent the same from flowing to the lands of the complainant, and deny that I have directly or indirectly, while the flow of the river was only about 450 cubic feet per second, diverted far in excess, or at all in excess, of 300 cubic feet per second of the waters of said river, and deny that I have directly or indirectly diverted any water which I was not entitled to divert under the terms of said decree. As will be more particularly shown hereafter, there has been absolutely no diversion by me, or under my advice or encouragement, from the waters of said river except the natural overflow as it has always been accustomed to flow during the high water of each season. To the best of my recollection, I have only seen Henry Luig in a cattle deal and have never spoken to him concerning the question of the diversion of water, or upon any matter relating to the dams or the decree or the matters referred to in the affidavit of the said Gilcrest. Section 31 is in the care of Carey Thornburg under contract and I have spoken to him briefly in this connection as will hereafter more particularly appear. If I have seen the remaining defendants, Geo. W. Young, Hull Hotchkiss, James Dalton, Robert Hudspeth and P. G. Smith, it has been only the casual meeting of neighbors and no word whatever has passed between us relating to the waters of Silvies river or the use of dams,

or the decree, or any of the matters referred to in the affidavit of said Gilcrest. I have been exceedingly busy this spring in turning out cattle and also in selecting and marketing cattle upon contracts and in attending to the affairs of large ranches which are thirty and seventy miles from each other; I have been absent from Harney Valley much of the time and as yet have given no orders for the actual diversion or appropriation of water, but only such orders of preparation for the irrigating season commencing by the terms of said decree on the 5th of May and as will hereinafter particularly appear, except this: About the middle of March I consulted with one of my counsel, Mr. C. E. S. Wood, as to what could be done to remove all cause of complaint against me by the Pacific Live Stock Company and if possible to start the commencement of a neighborly feeling, and after such consultation I returned to Harney Valley and gave instructions which were carried out that the head of the drain-ditch was to be sealed water-tight, the dam in section 21 kept wide open and though I was advised there was no obligation on me to take the burden of correcting the natural banks of the river, nevertheless I ordered all gaps where water might waste to be stopped up in the banks of the river, which was done.

Answering the specific points made in the affidavit of the said Gilcrest, I say as follows:

I.

Answering paragraph I of the said affidavit, I say that so far as I am informed and believe Henry Luig did

not in the month of April, 1915, or at any other time, close the dam in section 31, referred to in that article, but the boards were put in said dam by my own order given to Carey Thornburg, which is the order just hereinbefore referred to by me. That I gave such order and used such dam upon the advice of counsel and for the following reasons: At the time of said decree and long prior thereto said dam was in existence in the same place where it now is. The said dam was originally constructed by Peter Stenger for the purpose of irrigating section 31 from the waters of Silvies river, which section Stenger at that time had under lease from Charles Altschul, forming a part of what is known as the old Wagon Road Land Grant, and neither Stenger as lessee of said section nor Altschul as the owner thereof were parties to this suit, nor to the decree in question. I succeeded to Stenger in the lease of said section in 1898, according to my present belief, but at any rate before the commencement of this suit and before the entry of this decree, and succeeded to Stenger's interest in said dam in section 31 for the purpose of irrigating said section 31, and as before stated I was not made a party to this suit as lessee of said section 31, nor was Charles Altschul, the owner in fee simple. On July 1, 1903, the said section 31 was sold by the said Charles Altschul, by mesne conveyances, to the William Hanley Company, and during every year hereinbefore mentioned, to-wit: from the time of the Peter Stenger lease long before this suit and this decree, the said dam has been used by the lessees or owners of section 31 for the irrigation thereof without the intermission of a single season until the present time.

That about the time I acquired the lease of section 31, and certainly long before the commencement of this suit or the entry of this decree, I constructed a new dam in the place of the old Stenger dam, which new dam is the dam here in question and which was referred to in the decree. Casper Luig, the predecessor in interest of Henry Luig, assisted in the construction of said new dam and was by me allowed, in consideration thereof, a joint interest in said dam for the purpose of watering his holdings in section 6, particularly described in the complaint and the decree, to-wit: The East $\frac{1}{2}$ of the SW $\frac{1}{4}$ and lots 6 and 7 and the SE $\frac{1}{4}$ of the NW $\frac{1}{4}$ and lots 3, 4 and 5, all of section 6, T. 24 S. R. 31 E.; and the said Luig also used said dam for the purpose of diverting water to irrigate other lands not mentioned in said decree and as I am informed and believe and so state and according to the best of my recollection such dam has so been used every year ever since said construction, prior to the decree, without intermission. I, therefore, state to the court under oath, as a purgation of the alleged complaint that in ordering the said Carey Thornburg to put the boards in said dam as charged in the first article of the complaining affidavit, I did what I had been doing continuously long prior to the decree and under the belief, as advised by counsel, that my right so to do and my right to continue so irrigating section 31 was a right of the William Hanley Company as successor in interest to Charles Altschul, the owner of section 31, and was in no wise affected by said decree.

II.

Answering paragraph II of the complaining affidavit, I say as before that I have never had any conversation with George Young, Hull Hotchkiss, C. H. Voegtly, or any of them, as to their management of the dam referred to in the affidavit, or diversion of water from Silvies river this year, and have neither directly nor indirectly encouraged them to any violation of the decree, or to any act whatever in the premises. That while I wish to be emphatic in the foregoing statement that I have neither directly or indirectly, nor by advice or encouragement, taken a drop of water from Silvies river this year by said Young dam, I wish to be entirely frank with the court and state that I consider myself the actual owner of said dam by purchase from Young, and I purchased said dam for the purpose of using it to divert water from the river to irrigate section 29, and section 29 stands in exactly the same category and relation as section 31 referred to in the preceding article, namely: it is a Charles Altschul or Wagon Road section, which was in no way involved in this suit or this decree, and has since this decree by mesne conveyances been acquired by the William Hanley Company. That until yesterday, the 29th day of April, 1915, when the complaining affidavit was served upon me in Portland, Oregon, I had no knowledge of the Geo. W. Young contempt proceedings, or that he had been ordered to remove said dam or purge himself of contempt by paying costs. I am advised by counsel that the said decree in the contempt proceedings against said Young does not specifically require said Young to remove said dam, but

only to refrain from obstructing the flow of the river except as permitted by the decree, and to pay costs. However, to make this point absolutely clear, I wish to repeat that though I purchased the Young dam in good faith and in entire ignorance of any decree against it or Young, I have not used it, nor incited anyone to use it, and did not know it had been used this year.

III.

Answering paragraph III of the complaining affidavit, I do not have any interest in the dam therein referred to and knew nothing whatever of the circumstances therein related. Though Carey Thornburg is hired by the William Hanley Company to look after section 31, as hereinbefore stated, yet he has lands in which he himself is interested which are served and irrigated by this dam, and though I know nothing whatever of the facts and circumstances, I would assume that Hotchkiss and Thornburg, if they did any of the acts alleged in said paragraph III, were acting for their own benefit.

IV.

Answering paragraph IV of the complaining affidavit, the words "Hull Hotchkiss" have been erased at the commencement of said paragraph and the name P. G. Smith inserted, but further on the name Hull Hotchkiss remains. I assume that this erasure indicates the name intended, namely, P. G. Smith, but whatever names be used or intended, I did not assist, advise or en-

courage the persons named in said paragraph IV, or any other persons, to said act or any other acts. In fact, I knew absolutely nothing about the facts complained of in paragraph IV until I read same here in Portland. I have never seen the dam referred to in said paragraph IV as the "new wooden and rock dam" and I do not know even by hearsay that any such dam is in existence. In fact, P. G. Smith owns the SE $\frac{1}{4}$ of section 30, Hull Hotchkiss owns the NW $\frac{1}{4}$ of said section 30 and Carey Thornburg owns the SW $\frac{1}{4}$ of said section 31 and George Young the NE $\frac{1}{4}$ of said section, and if Smith, Hotchkiss and Thornburg did anything at all in the premises, as to which I have no knowledge whatever, they were undoubtedly acting of and for themselves and of their own interest, and I emphatically state that I have never given assistance, advice or encouragement to them, or any one else in the premises.

V.

Answering paragraph V of the complaining affidavit, I will say that the drain-ditch referred to was positively not open during a long period in the months of March and April, or otherwise than as here and now stated: During the winter of 1914-15, and prior to the middle of March, 1915, the water in Silvies river froze very heavy and thick so as to constitute a dam or obstruction in Silvies river and when the flood-water commenced, the channel being thus obstructed, the water was excessively thrown out over the banks of the river for a considerable period of time. The William Hanley Company was feeding cattle on sections 27 and 35,

which are the same sections for the drainage of which said ditch is provided and the draining of which at all times when necessary is allowed by said decree. The hay with which said cattle were being fed was situated in large tracts on said sections 27 and 35 and in order to protect these feeding grounds from the overflow water, the said drain-ditch was opened and kept open for no other purpose than to drain said lands as it was allowed to do; but about the middle of March, after talking with counsel, C. E. S. Wood, in Portland, and for the purpose of early in the year eliminating any possible ground of complaint, the head of the said drain-ditch was closed by my order and tamped tight with manure and I have so seen it from time to time myself and it so remains at this present time. I emphatically deny that this drain-ditch has been, in March or April or at any time this year, used for the irrigation of any of my land or the William Hanley Company's land, or otherwise than as a drain-ditch as permitted by the decree.

Answering further paragraph V of the complaining affidavit, I deny that during the months of March or April, or at any other time during the year 1915, I placed or maintained, or caused to be placed or maintained one board part way across said dam, or permitted or suffered a large amount of brush and debris to gather above the said dam, or by any other device, contrivance or trick diverted into the said Hanley upper ditch any water whatever. I am necessarily absent from this locality, and indeed from any one particular locality of the many properties under my charge, a great deal on business of the company, and while I cannot admit it for I

do not know, I will say that it may be possible that for some short period one board may have been part way across the dam. If this was so, it was without design, without my instruction, and without my knowledge, and if so it could not have had any material effect on the stream. The said dam I would guess to be about 24 or 25 feet wide; it is practically the whole width of Silvies river, and the boards are of different widths; some six inches and some eight inches. I do not understand whether the affidavit is meant to say that brush and debris gathered in the river on the premises of the William Hanley Company above the dam, or whether the brush and debris gathered in the dam itself by reason of this board. But I will say whatever may be the facts and circumstances, it is not true that brush or debris were deliberately permitted to gather and remain in the river so as to act as an obstruction to the flow thereof, but all such accidental obstructions, which to a slight and temporary extent occur every year, were by my orders removed as promptly as perceived, for the reason as above stated that I was very anxious to avoid this continual coming into court for the settlement of difficulties with the Pacific Live Stock Company, and I deny that the water was raised in the river by this board, or brush, or debris, or any other acts of mine, or of my servants or agents, a foot higher than the floor of said dam, or in excess of 40 cubic feet of water per second, or any other substantial quantity was diverted into the said ditch.

Answering further paragraph V of the complaining affidavit, I deny that in March or April of 1915, or at any other time, I made, or caused to be made, or suf-

ferred to be made, any of the cuts in the east bank of the east fork of Silvies river, as charged in said paragraph. The banks of Silvies river have been made by a deposit of many years of debris and silt brought down by the flood water, so that gradually the water of the river has been raised in many places to a level or above the level with the surrounding country some distance back from the river and the banks of the river generally are higher than the surrounding country. Therefore, as the river rises it runs out to the low places in the banks of the river and runs away to and spreads over the surrounding lands. Though I was advised that it was not my duty or obligation so to do, yet in order to conserve the water this spring as much as possible within the banks of the river and avoid any captious quarrel with the Pacific Live Stock Company, I filled certain gaps in the river bank which were natural gaps and depressions, but through which a great deal of water could run away as it had always been accustomed to do when the river commenced to rise. While I have no knowledge that any of these have in fact washed out, yet it is possible that this may be so and the work done in filling these gaps may have been mistaken for cuts in the bank, but I emphatically deny that any cuts in the bank were made as alleged in said Paragraph V, or otherwise, or that the banks of the river were in any way altered, except for the benefit of the complainant.

VI.

Answering further said complaining affidavit, I have no knowledge or information sufficient to form a

belief as to how much water of the west fork of the river would be diverted by the dam referred to in Paragraph I of the complaining affidavit and, as already stated, I hold myself responsible for such diversion for the benefit of section 31 as already stated in Paragraph I of this affidavit; but I find that the other charges against me are that I aided and encouraged Young, Hotchkiss and Thornburg in the alleged violation of the terms of the decree set out in Paragraph II and aided and encouraged Hotchkiss and Thornburg as set out in Paragraph III, and aided and encouraged Smith and Thornburg as set out in Paragraph IV, all of which is absolutely untrue and without the slightest foundation and cannot be shown without absolute perjury; and I am charged by Paragraph V with permitting one board to be half way across the dam in section 21 and suffering brush and debris to collect; with permitting the timbers of an old bridge which had been destroyed to fall in and lodge in the river and maintaining another bridge over the river, the stringers of which are set into and over the banks of the river, and permitting the carcasses of dead cattle and hogs and other material to collect and obstruct the channel, all of which I deny and which is absolutely untrue, except that I have constructed a new bridge as a matter of greater convenience and to save distance in hauling, but neither the old bridge nor the new bridge can or does obstruct the flow of the river. We keep all stock away from the channel of the river during the winter time for fear of their breaking through the ice and drowning. I heard this winter that there was one hog in the channel drowned, and that is all in

this connection which ever came to my knowledge. I further say that with the exception of the matters in the first paragraph alleged, all these charges and complaints are frivolous and if the facts were true the obstruction to the flow of the river would be petty and immaterial and nothing which could not be quickly remedied and removed without going into court, by simply calling my attention to the matter, or to the attention of any of my representatives, in a neighborly manner, because my representatives have had express instructions during my absence to give an excess of attention to any complaints of the Pacific Live Stock Company and to see if we could not get into something like neighborly living; but on the contrary, although they must have had somebody making the observations on which the said affidavit is based; though they must have been upon the lands of the William Hanley Company; though in fact I freely granted to their surveyor, whose name I think is Payne, permission to go upon any of our premises for the purpose of measuring the water of Silvies River, his purpose being as he told me to try and determine how much flood water was necessary for the irrigation of specified areas of land, not once has any complaint been made to me, or any of my representatives, or have I had the slightest suspicion that the complaints here charged in this affidavit were being harbored against me; on the contrary, in accordance with my own express wish, which was agreed in by my counsel, Mr. C. E. S. Wood, I determined to make an effort to end this foolish hostility, and this first being informed of a complaint by the service of a writ by a United States Marshal. Having

business in Salt Lake City, I went by way of San Francisco for one purpose among others to see Mr. Tredwell and try and agree with him on some sort of manly and neighborly conduct to at least let each other know of our grievances against each other in a neighborly way, and then if we couldn't agree resort to the court only as a last resort and for some important matter. Mr. Tredwell was himself out of town, but I saw his secretary; explained to him my mission, which he said he would communicate to Mr. Tredwell. Afterwards I received a letter from Mr. Tredwell to the general effect that he thought we could adjust all these little differences and it would be well to do so and to wait until he came up. The letter is at my home office in Burns, Oregon, and I am making this affidavit now away from Burns and sources of information, because of the short time in which I am allowed to appear and show cause; but on my return to Burns I will try and find said letter and send it to my attorneys to be attached as a part of this affidavit. The State Water Commissioners commenced to take testimony in Burns, Harney County, Oregon, adjudicating the water rights of Silvies River, which testimony has been continued until July 12th of this year, but Mr. Tredwell appeared in Burns as the attorney for the Pacific Live Stock Company in this procedure, I would say about the middle of April. At that time we went down the river over this whole portion covered by the complaints in the affidavit on the east fork of the river down to and below what is known as the Orphan's Head Gate, which is in the northeast corner of section 34, belonging to the Pacific Live Stock Company, and

at no time did he mention to me any of these complaints referred to in the complaining affidavit, nor did he make any complaints whatever; but later on, Sunday, April 25, 1915, down at the Island Ranch, the property of the Pacific Live Stock Company, where I had gone partly for the purpose of seeing Mr. Tredwell to endeavor to come to a general understanding, but principally to get Mr. Cochran, the Water Commissioner, and his official stenographer and take them on down to the P-Ranch, I saw Mr. Tredwell and in the course of conversation he exhibited a good deal of feeling or irritation, and instead of going into the matter as I had hoped and expected, he simply directed me to take out the dam in 31, which is referred to in the first paragraph of the complaining affidavit, and said to me that after I had taken it out he would then let me know whether he would sue me or not. I replied, in effect, that the dam had been built by me long ago; that it was never in the decree; that it was on section 31 and watered section 31, which was at that time a Road Land section and was knowingly omitted by Mr. Minor from the litigation. I did not say to Mr. Tredwell, but I do say here, that it was not the policy of Mr. Miller to get into any quarrel at that time with the Road Land people and Mr. Charles Altschul, and that this section was deliberately omitted, but whatever the reason, the record will show that it was omitted. I then went on to say to Mr. Tredwell that my main purpose was to take Mr. Cochran and his stenographer on down the valley; that I would return Monday, the following day, and would be very glad to take up all matters with him in detail and discuss them with him on

the ground for a final settlement and friendly agreement. To this he made no reply that I remember of. I did not see him again until the following day in the town of Burns, when I again endeavored to bring up the subject of our differences and a friendly adjustment of them, but he simply told me that I wouldn't know my dams when I saw them, by which I found he meant he had sent his men onto our property and had them torn out. This is the last conversation I had with Mr. Tredwell on the subject.

I further desire to say that the complainant herein, the Pacific Live Stock Company, is doing all in its power to monopolize the water of Silvies River and to terrify all those who oppose it. That as an instance of such monopoly, which I believe to be lawless, and also as a reason why there is a diminution of water in Silvies River at their own properties, I say that they have been making recent very large diversions of water on their properties in Silvies Valley, which is on the upper part of the river before it reaches Harney Valley, which appropriations of water they have no right to make, but which are appropriations long subsequent to this decree and to rights accrued to numerous settlers and prior appropriators in Harney Valley. I would guess the amount of such diversions to be not less than 100 cubic feet per second, but will endeavor to procure from the State Engineer an exact statement of the amount of water they have applied for and file it as a part of this affidavit. Although Judge Bellinger by his decree in a former contempt proceeding required the complainant to keep in good repair as it then existed the headgate

on their property in the northeast corner of section 34, known as the Orphan Head Gate, they have torn out said head gate and put in a new one of a great deal larger capacity, and have built a high levee, so that they are diverting, or can divert, not less than 30 cubic feet per second, and are carrying said water so that it is entirely diverted from the channel and general drainage of the east fork of the river, and in this connection they have built a levee so that with the ditch from the Orphan Head Gate full of water and unable to carry more, and with the levee acting as a dyke for the purpose of backing up the water to give it gravity flow, they have both obstructed the flowage of flood water off from section 27, the property of the William Hanley Company, and have backed the water of the river back onto said section 27 so that it stands there to a depth of say from two to three feet, destroying the grass on and the value of 160 to 200 acres of said section 27, and this diversion of water is having the effect of absolutely preventing the natural overflow upon and irrigation of sections 2 and 3, which are the property of the William Hanley Company, James Peary and Thomas Houser, holding different parcels in severalty.

WM. HANLEY.

Subscribed and sworn to before me this 1st day of May, 1915.

(Seal)

V. A. CRUM,

Notary Public for Oregon, residing at Portland, Oregon. Commission expires.

Due service of the within motion and affidavit by

certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, May 6th, 1915.

WIRT MINOR,
Of Attorneys for Pacific Live Stock Company.

Filed May 6, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on the 12th day of July, 1915, there was duly filed in said Court and cause an opinion, in words and figures as follows, to wit;

OPINION.

No. 2577.

*In the District Court of the United States for the
District of Oregon.*

PACIFIC LIVE STOCK COMPANY,

a corporation

Complainant,

vs.

W. D. HANLEY, *et al*,

Defendants.

Edward F. Treadwell and Teal, Minor & Winfree.
for Complainant.

C. E. S. Wood, Erskine Wood, Wood, Montague
and Hunt, and Lionel R. Webster, for Defendants.

WOLVERTON, District Judge:

This is a proceeding charging W. D. Hanley, Henry Luig, George W. Young, Hull Hotchkiss, Carey Thornburg, James Dalton, Robert Hudspeth, and P. G. Smith with contempt of court by reason of wilful violation of certain provisions of the original decree entered in the above entitled cause settling the relative rights of the parties to the use of the waters of Silvies River, and the East and West forks thereof, before entering Lake Malheur. The persons named are charged, some jointly and others singly, and in different relations. It will be sufficient to make a brief statement of the issues presented as we come to them, without setting forth the pleadings in any considerable detail.

Generally, it is alleged that the parties named conspired together for the purpose of diverting water from the East and West forks of Silvies River, in violation of the provisions of the original decree, to the injury of the plaintiff. The evidence does not sustain this charge, and I am persuaded that there has been no intentional, concerted action of the kind.

Specifically, it is first charged that Henry Luig violated the provisions of the decree in that, in the month of April, 1915, he completely closed what is known as the Luig or 31 dam in the West fork of the river, situated in Section 31, township 23 South, Range 31 East, and in this relation it is further charged that William D. Hanley encouraged, advised and assisted Luig in so closing such dam. Luig denies the charge in toto. But, on the other hand, Hanley frankly states the defendant Carey Thornburg put the boards in through his, Han-

ley's direction, and affirms that he had a right so to do, and bases that right upon the alleged facts that one Peter Stenger was, prior to the entry of the original decree, a lessee of Section 31 from Charles Altschul, the section being a part of the grant to the Willamette Valley and Cascade Mountain Wagon Road Company; that Stenger constructed the dam in question for the purpose of irrigating said Section 31; that Hanley, prior to the commencement of the suit and the entry of the original decree, succeeded to the interest of Stenger in his lease and said dam, and that Hanley has, since the entry of such decree, through mesne conveyances, succeeded to the fee simple title of said section. Then it is further alleged that neither Stenger nor Altschul was made a party to the original suit; that prior to the commencement thereof Hanley reconstructed the dam in question, but that Caspar Luig assisted him, and was allowed a joint interest therein with Hanley, and that said dam has been used by the lessees or owners of Section 31 for irrigation of such section continuously to the present time. Hanley was himself a party to the suit, and the decree was entered largely upon stipulation. By the findings of the Court it appears that Caspar Luig owned certain land, and that he had a dam—describing the dam in question. It was stipulated that the decree should provide, and it was thereupon provided, that Caspar Luig might maintain his dam from the 15th of May to the 1st of July each year, “in the manner and form as the same is now maintained,” and “use the waters * * for the purpose of irrigating and in sufficient quantities to irrigate,” certain lands,

describing them, but that, except for the period designated, he should keep said dam open and the channel of the river unobstructed thereby.

A good deal of testimony has gone in respecting this Luig dam, Mr. Hanley asserting, as he alleges in his answer to the charge, that he rebuilt the dam about 1898, that Luig assisted him in the work, and was permitted to have an interest in such dam by reason of such assistance. Hanley evades the inquiry as to whether Luig was using the dam at and prior to the time of reconstruction by saying merely that "Mr. Luig assisted me in putting it in." But later he admits that Luig, or rather the two Luigs, Caspar and Henry, had something to do with the Stenger dam. Henry Luig has succeeded to Caspar's interest in the dam in question. The old dam (perhaps the Stenger dam), it must be stated, was somewhat above the present location, and had been washed out. Mr. Hanley positively denies that Luig has been operating this dam under the decree ever since the time it was rebuilt, but further asserts that every year since the entry of the decree he has positively violated the provisions thereof with respect to such dam. When pressed, however, on the subject he says, "I wouldn't want to go back further than Mr. Thornburg without giving it a little special thought," and finally admitted that, beyond that, he could not state any specific time that he had "given an order on this dam," that is, regardless of any decree. Finally this question was propounded to him: "There is no question about this dam being used, Mr. Hanley, every year. I am asking you, has this dam been used before the time the

decree permitted it to be used, on the 12th day of May or the 15th day of May, I believe it is, by this decree? That is what I am asking you." To which he answered: "Well, I am not prepared to state right now, Mr. Treadwell, but I will say this, to make it plain, that I did order the boards put in this year."

George W. McLaren testifies that he had, in some of the previous years put the boards in earlier than the 15th day of May. Henry Luig, however, testifies, that Sam Voegtly put the first dam in in Section 31, which was about 1886, that they used the dam every year until his brother's death, and since then he has used it every year, and that they put in a new dam in 1905 or 1906; that he does not know whether there was any talk with Hanley about it when the new dam was put in, the same having been constructed in his absence, by his brother, and he does not know whether Hanley assisted in constructing it or was given an interest in it, but he is positive that when the first dam was built Hanley was not asked anything about it, nor did he ever have anything to do with it until the new dam was put in, in 1904, '05, or '06. Witness further states that, ever since he has had charge of the property, he has put the boards in about the 15th day of May, and not before.

In the light of this testimony, it is difficult to believe that Mr. Hanley ever acquired any interest in this dam. But if he had an interest therein, as he alleges, he acquired it before the suit was commenced or the original decree entered. He was a party to that suit, and responded in so far as to set up his interest in other

leased lands, and it is very natural to assume that if he had an interest in this dam at the time, and was using it for the irrigation of Section 31 and Section 5, as he now alleges he is using it, he would have set it up at that time, and had his rights declared. He knew, of course, that the specific uses to which the dam could be put were being declared, and that its use was being limited by the decree to the irrigation of the Luig lands, and none other, and, thus restricted, it could not be used for the irrigation of sections 31 and 5, and, having this knowledge, he failed to assert his interest therein. It is too late now for him to assert any interest in this dam. The decree has specifically declared its status and limited its use, and it can be used for no other purpose without a violation of the decree; and this would be so whether the attempted use was by a party to the suit or by a party not related thereto, until otherwise declared, which would require a modification of the decree. Sec. 268 Judicial Code. *United States v. Debs*, 64 Fed. 724, 755; *Ex parte Stickney et al*, 40 Ala. 160.

It was a violation of the decree, therefore, for Hanley to close the Luig dam prior to May 15th, as he did in the present instance. Luig evidently has not intentionally violated the decree.

The second paragraph of the charges relates to the alleged construction by George W. Young, Hull Hotchkiss and Carey Thornburg of a new dam across the West fork of Silvies River, some distance above the location of the old dam permitted by the decree, and known as the Young dam. It is complained that the

new dam is constructed with a permanent board across the floor, which raises the water in the stream at all times about a foot and three inches, and a new ditch leading from above said new dam onto the lands of Young, Hotchkiss and Thornburg, and that by means of such ditch and dam water was diverted during the month of April, 1915, in excess of two cubic feet per second, in violation of the provisions of the decree respecting said Young dam and the use thereof. In this relation, it is also alleged that these defendants, in the construction of said new dam and the diversion of the water from the stream, have been acting under the advice and encouragement of the defendant William Hanley.

Young, Hotchkiss and Thornburg deny any violation of the decree in respect of the matters complained of, and set up that Young constructed the dam for Hanley, and describe the manner of its construction, namely, that a board is placed across the floor of the dam as a necessary part of the structure, which results in raising the water from 8 to 10 inches above the level of the framework of the dam. It is further alleged that the framework constitutes practically no obstruction to the flow of the water in the stream.

Mr. Hanley denies any collusion or intentional, concerted action with the defendants last named, with a view to diversion of the stream as alleged, but he claims ownership for himself as it respects the dam, and asserts a right to use the same for diverting water to irrigate Section 29.

Mr. Griffing made observations and measurements respecting the Young dam, the new dam, on April 24 and 25, 1915. He found an old ditch on the west side of the river, running westerly along a road through the Young and Hotchkiss property; also a new ditch constructed from above the new dam, and running into the old ditch; that water was running from the river, through the new ditch into the old, and thence out through it, spreading into the county road, and continuing into Hotchkiss' fields south; that the old ditch was shut off from the main stream by a headgate, and that the water as contained in the ditches stood more than 1.8 feet above the water in the river. He affirms that the water could not naturally flow into the old ditch from the river at that time, and that by use of flashboards put in the dam the water above the dam was raised to the extent of 1.8 feet above the water in the stream below.

Gilcrest corroborates Griffing as to the diversion of water on the 25th of April, and states that Young was there at the time. Treadwell asserts that Hanley told him, in effect, that his tenant was using the Young dam.

Mr. Young in his testimony disclaims any interest whatever in the new dam, and states that Hanley uses it for the irrigation of Section 29, and that witness has made no use of the dam this year at all. He is of the opinion that the permanent board in the dam raises the water about 8 inches, and that the permanent boards in the old dam raised the water 30 inches above the floor,

and that this was the case at the time of the entry of the decree. It may be stated in this connection that the new dam is situated from 900 to 1000 feet above the old on the stream.

Hull Hotchkiss asserts that the permanent boards in the old dam raised the water in the stream about 30 inches, and in the new dam around a foot; and that, as constructed, the water in the new dams stands about on a level as it stood with the old dam in place. The old dam has not been used for the last seven or eight years, and witness indicates his intention of putting in a dam where the old one is located, and says that Young is going to join with him in its construction.

Thornburg denies having anything to do with diverting water from above the new Young dam, or having any ownership in the dam, although he admits getting the use of what surplus water passes over the Hotchkiss place.

Mr. Hanley testifies that he took over the Young dam from Young, and that he (Hanley) is really the owner of it; that Young was about to remove it on account of a contempt proceeding which he had recently been through, and the witness took it off his hands, and now asserts the right to use it for diversion of water for irrigation of Section 29. Charles Altschul was the owner of Section 29 at the time of the institution of the suit and the entry of the original decree, and the Hanley Company is the successor to Altschul in the title to the land, and by reason thereof the Hanley Company claims the right to maintain the dam and operate

it for the irrigation of said Section 29. Altschul was not a party to the original suit. Hanley denies, however, that any water was diverted this year by means of the dam upon the east side of the river for irrigation of the Hanley Company's Section 29.

In so far as Young is concerned, as it relates to his use of water, that has been twice settled, by two decrees, the original decree and that entered when the cause was before Judge Bean. Judge Bean says: "The construction of the new flume or ditch in 1911, if intended to be used for irrigation, was contrary to the terms of the decree;" and hence Young was relegated to the use of the old ditch on the west side for irrigation purposes on that side of the river. The Court at that time further held that he had no right to permit water that he did not use to go down onto Hanley's section 29—Young being entitled to sufficient to irrigate his own land—and that, although he may have use for less water now than formerly, he is confined to his actual use and need, and the surplus must go down the channel of the river. As respecting this dam, and the use of the water therefrom, the decree is explicit. It provides that Mrs. A. E. Young and George W. Young "may maintain one dam * * * where a dam is now constructed and built * * * and the ditches maintained in connection with said dam by the said defendants (Young & Young) jointly or severally, and by means of such dam and ditches may obstruct and divert waters from the West fork of Silvies River from the 12th day of May to the first day of July in each year in sufficient quantities and for the purpose of irrigating the lands (describing them),

and shall have the use and enjoyment of such waters as may flow from the West fork of Silvies River while the channel of said river is unobstructed, and from natural causes at all times when the same shall flow upon said lands of said defendants by overflowing the banks of said river or by flowing through the ditches of said defendants while the flow of the water in said river is unobstructed by the dams on said lands."

The decree further provides that Hotchkiss and Voegtly (the latter being succeeded by Thornburg in his land holding), may jointly have one ditch leading from the Young dam, by which they may divert water from the river upon their premises, within the time limits fixed as respects the Youngs, and with the same right to the use of such waters as might flow upon their lands with the river unobstructed.

Now, there can be no doubt that flash-boards were put in the new dam for the purpose of diverting the waters at times other than as permitted by the decree for diverting water by means of the old dam, and that water was actually being conveyed upon the west side from the stream by means of the new connection and the old ditch. Griffing says he saw the flash-boards in the dam, and all concur in having seen the water in the old ditch and running out upon both sides of the road. Young affirms that he has used none of the water this season, Hotchkiss knew, however, that the water was coming through and upon his land, and Thornburg declares his willingness to use any surplus that might come down to him. So that, while Young should be

exonerated, Hotchkiss and Thornburg must be held to a violation of the decree.

Their especial defense is that the new dam does not raise the water any higher in the stream than the old dam did, at the location of the new dam. The old dam, they say, raised the water in the stream about 30 inches, while the new raises it from 8 inches to a foot. It appears that the stream is sluggish, and the fall something like three feet to the mile—not over that. If this be true, the fall between the dams is only six or seven inches, so that the defendants have over-proven their case, because the difference between one foot and 30 inches is 18 inches. Making allowance for six or seven inches fall, their new dam would still lack 11 or 12 inches to raise the water to the height of the old dam. It is very plain to my mind that a dam, with permanent boards raising the water in the channel of the river 30 inches, is an obstruction to the natural flow of the stream, and that the old dam was such an obstruction if it raised the water as seems to be claimed for it, and its maintenance in that way was a violation of the decree.

Hanley could acquire no better or superior right or interest in that dam by purchase from Young than Young had primarily. And as to the claim of Hanley that he helped to construct the dam, he could acquire no right to the use of the water thereby, for the reason that the dam was treated of by the decree. Young, Hotchkiss and Voegtly were permitted to maintain one dam at or near the locality where the old dam was located at the time of the entry of the decree, which

dam when open should not unnecessarily obstruct the flow of the water in the stream. And the fact that Hanley assisted in the construction of the new dam could give him no greater rights than the original parties had to the use of the old dam. Furthermore, Hanley was a party to the original suit, and he is bound, as in the case of the Luig dam, by the terms of the decree respecting the particular dam. Judge Bean, in the Young contempt proceedings, has held that Hanley could get none of any surplus water there might remain over Young's use; and he certainly has none that the decree has given him; so he violates the decree when he attempts to use any by virtue of the Young dam, whether old or new.

I am persuaded that the new dam is not in the approximate location of the old, and that it, with its new diversion by means of the new ditch and flume which Judge Bean condemned, and the additional diversion upon the east side, which was also condemned, is not such a structure as was contemplated by the decree, and should be removed, and a new dam constructed at or near the location of the old, to conform with the intent and purpose of the decree.

The third paragraph charges Hull Hotchkiss and Carey Thornburg with having closed, in part at least, a dam known as the old Voegtly dam, situated in the southeast corner of the southwest quarter of Section 30. The defendant Hotchkiss answers that he has no interest in this dam, and has had nothing whatever to do with its management. Thornburg, who is the successor to

Voegtly in the ownership of the southwest quarter of Section 30, answers that the Voegtly dam has been maintained in the river at the same location for about 20 years, and has been used every year during the irrigation season, that is, from May 12 to July 1, for irrigating part of the Voegtly land.

The decree shows that, by stipulation of Hull Hotchkiss and C. H. Voegtly, they were entitled to maintain one or more ditches, jointly or severally, from the old Young dam, and to divert water from the river in sufficient quantities to irrigate the lands of Hull Hotchkiss, being the east half of the northwest quarter and lots 1 and 2 of Section 30, and the lands of C. H. Voegtly, being the east half of the southwest quarter and lots 3 and 4 of Section 30. The decree contains no provisions or reference to the Voegtly dam whatever. Voegtly was a party to the suit, and manifestly at that time was the owner of the east half of the southwest quarter and lots 3 and 4 of Section 30, because he stipulated concerning the premises, and from what source he should receive the water for their irrigation, and it was not from the Voegtly dam, but from the Young dam.

Thornburg has succeeded by title to Voegtly, and can claim nothing except what Voegtly could have claimed under the decree, as it respects the water privileges.

The evidence shows that Voegtly constructed the Voegtly dam, the old dam, in 1895, which was prior to the institution of the suit and the entry of the original decree, and it must be assumed, he being a party to the

suit, that he waived his right to the further use of that dam by stipulating that he should have the right to sufficient water from the Young dam to irrigate his land, and of course he could not claim the right now to use from the Voegtly dam for irrigating the same premises. Neither could Thornburg claim such a right, holding from Voegtly. Thornburg, notwithstanding, claims he gets the most of his water for irrigating his land from the old Voegtly dam. This is done by putting boards in the dam and making it overflow the banks in "little natural cuts that are there," and by sub-irrigation when the banks are full, the water being backed up by the dam. A ditch leads out from the dam, but it is used as a drain ditch rather than for irrigation, and during irrigation time it is closed. Thornburg claims also to have used the dam in this way right along for 15 years, the time of use running each year from May 12th to July 1st, and that he supposed all the while that the dam was specified in the decree and its use regulated. In this supposition he is mistaken. He does not rely upon a prescriptive right, however, but upon a right acquired from Voegtly. That right pertains only to the Young dam, and none, as we have seen, can be deraigned on account of the Voegtly dam, because all rights thereto are precluded by the original decree. The old dam should therefore be removed.

The fourth paragraph charges that P. G. Smith and Carey Thornburg constructed a new dam of rock and wood a short distance above the old Voegtly dam, with an opening therein of 12.3 feet only, while the old dam was provided with an opening of 23.5 feet, and that the

floor in the new dam is 1.2 feet higher than the floor of the old, and that the new and old dam are raising the water in the stream in excess of one foot in the channel. The testimony shows that such a dam has been recently built, that Thornburg constructed the same, and that Smith was employed by him in doing the work. Thornburg having no right to the use of the old Voegtly dam, he has no right to construct or to use this one. He must look to the Young dam for the irrigation of his premises. The new dam should also be removed.

The fifth paragraph charges that William Hanley, during the months of March and April, 1915, kept open the head of a certain drain ditch, known as the Hanley drain ditch, running from the East fork of the river, when there was no necessity therefor, contrary to the provisions of said original decree; that during the months of March and April of the same year he maintained a board part way across his 21 dam, and permitted and suffered an accumulation of brush and debris to gather above the same, so that it became obstructed and raised the water to the extent of a foot above the floor of the dam, and by means thereof diverted water into the Hanley upper ditch in excess of 40 cubic feet per second; that Hanley made diversions of large quantities of water from the stream by means of cuts in the banks of the river, specifically describing two of them, and naming the others as numerous smaller cuts, all from the East fork and upon the lands of Hanley; and that Hanley had further obstructed the channel of the river, by maintaining therein the timbers of an old bridge, by constructing a new bridge, with the

stringers let down below the tops of the banks, and also by permitting the carcasses of dead stock and other material to become lodged in the channel; all contrary to and in wilful violation of the original decree.

I need not stop to discuss the alleged obstructions by means of the bridges and the dead carcasses in the river bed, as I think none of them has materially obstructed the flow of the water in the stream. The old bridge might, with good propriety, be removed. Whatever dead stock may have been found in the channel, Hanley was not responsible for. But the charges as to the drain ditch, dam 21, and diversion by cuts in the banks of the river require more particular consideration.

Griffing found the drain ditch open on the 3rd and 8th of April, and diverting 30 second feet of water by practical measurement. It was closed later, some time between the 8th and 12th of the month. Ben Newman noticed the drain ditch taking water from the channel all through March and up to the 8th of April. He replaced the boards at times, but they were taken out again until about the 8th of April, when the dam was securely closed. Mr. Hanley does not deny that the headgate was open to some extent at times during the spring, and seeks to excuse the situation on account of the accumulation of ice in the stream, so that it was necessary to have the ditch open to some extent for getting rid of the surface water, and he further states that he ordered the gate closed early in April. This must have been, considering the testimony of Griffing

and Newman, after the 8th, when the gate was well closed.

There has been a great deal of controversy about this drain ditch—how and when it shall be used, and for what purposes. One thing seems to be settled, and that is, that its primary use is not for irrigation, but for drainage purposes only, and that from certain specified lands of Hanley. “Beyond that limited purpose,” says the Court of Appeals in a former contempt proceeding in this cause (200 Fed. 468, 484), “he is by that decree expressly enjoined from maintaining or using that ditch or any of the water thereof; and it necessarily follows that neither Hanley nor his successors in interest have any right to thereby divert any water from the river when its waters are not so high as to make it necessary or proper by means of the drain ditch to drain surface water from the lands specifically described in the 11th subdivision of the original decree.”

Before concluding whether this ditch was kept or allowed to remain open contrary to the spirit of the decree, it is necessary to examine in connection therewith the charges relating to dam 21 and the cuts in the banks of the stream.

As to the 21 dam, Mr. Griffing found a board across one of the four openings in it, and across the other three openings were lodged brush and debris, some of the brush having the appearance of being recently cut and thrown in the stream, which had the effect to raise the water in the stream to the extent of nine-tenths of one foot or a foot. This was ascertained by observations

taken at the time. At the same time he ascertained that Hanley's east ditch, leading from above the dam, was taking 40 second feet of water from the stream. Those conditions extended from the first until the 25th or 26th of April, 1915. Mr. Gilchrist also saw the dam when in the condition described by Griffing.

Mr. Hanley disputes Griffing and Gilchrist, and says he was at the dam about April 20th, and found no boards in either of the openings, and but a slight drift of brush, which he thinks could not have caused 40 second feet to flow out of the ditch on the east. Hanley at once gave orders that whatever brush or debris was in the dam was to be removed. Mr. McLaren, Mr. Hanley's witness, however, saw the board in the dam, but minimizes the effect of the willows and debris in the stream. He says he pulled out the largest of the willows, and the rest went down stream, and he raised the board so as to be no obstruction. There was at least inexcusable neglect of this dam by Hanley, whereby a greater flow of water was forced out of the east ditch and upon his lands during the time mentioned by Griffing than he was justly entitled to, seeing he is the manager of all of the Hanley Company's property. If Mr. Hanley did not know the condition at this dam, he ought to have known it, with the opening of the high water in the spring, and when he was entitled to no water at that juncture except such as would naturally overflow the banks and be conducted through the canals without obstruction in any way of the main channel of the stream.

Now, as to the cuts in the banks, Griffing, in his examination made for the express purpose of ascertaining the condition of these streams and the dams and obstructions therein, found a break or cut in the right or west bank of the river, about 1000 feet above the intake of the drain ditch, opening directly onto Hanley's Section 27. This break or cut was diverting, as near as the witness could get at it, about 50 second feet of water. He found another cut, below the drain ditch from 900 to 1000 feet, in the east bank of the river, taking out about the same number of second feet of water. This was also on Hanley's section 27. And below that again, on the same section, was another break, taking out 5 or 6 second feet. Still below, and on Hanley's section 35, was another, diverting about the same amount of water as the last. Besides these, there were other smaller ones, of which witness was unable to get measurements or estimates. Below all these breaks and diversions, Mr. Hanley was diverting practically all of the water that was left in the channel, by means of a dam in section 3 of the township adjoining the one in which previous diversions were being made. As to this dam, Hanley's right to its use at the time complained of has been previously established by decree of this Court. The result, however, of these diversions in the various ways above indicated was to prevent any water of any material or beneficial quantity from running down to the lands and premises of plaintiff for use by it. That the most important of these breaks existed in some manner in the banks of the river can hardly be questioned. What Mr. Hanley has to say about them is contained in part in the following record:

“Q. Now, you are accused of making cuts in the river bank through 27, for the purpose of facilitating the slopping over of the river for your benefit on that section, and there are some photographs here, or at least one, which I think I showed you, with a pole stringer across the gap, and some perpendicular boards laid in. I wish you would state whether you cut any gaps in the river bank at all, or did anything to lower the level of the bank, so as to aid the water of the river getting out?

A. I have had a man upon section 3 working on the river, with an assistant whenever he needed it, with special instructions to keep those gaps closed up; and when I went down with Mr. Treadwell, it was the first time that I had been down along the channel this season after the water came, and the water was running out every place and, of course, there might be some little nicks where it would cut; but I have no knowledge of any such a place being on the river; and if it were, why, it was just because it had broke itself out. There are dikes built along there, and they are not really overly substantial, most of them, and when the water breaks through a couple of feet above the surface of the ground, if it gets started once, those places cut out very quickly. If there were any place there, it certainly cut out. The man that was down there had full instructions to close them up, and I have brought him here as a witness. Q. What do you mean by ‘cut out?’ Cut out by your men, or by the action of the water? A. Cut out by the water—by the water. Q. You say you gave instructions that the low places should be repaired or filled, and the water kept in the river as far as possible;

but do you know whether they were carried out or not?

A. Well, this time that I went with Mr. Treadwell down there, and I know the river very well, it was in very good repair. It was an excessive amount of water to have, to go over the bank, the way we have operated it ordinary years. Q. Regardless of this year, and the strict language of this charge, have you ever sent out men, or given orders to have the natural bank of the river artificially cut into to let it out on your land? A. No, sir.

COURT: Do you know of any cuts being made without your order? A. Oh, no, there have been no cuts made by our people.

COURT: Or anybody else? A. No, by anybody else. I do not think there have been any cuts made. If there is any cuts in there, they have washed out.

COURT: It is a wash? A. Yes, the water goes out of there very swift.

Q. Now, there was something said by Mr. Griffing when he was on the stand, that he saw shovel marks, or spade marks on the edges of these cuts, showing that they had been artificially made. Do you know anything about that? A. Why, I don't know anything about it. If they were, it was probably made by the man that was in charge just stopping up those places. Probably the places that he put in went out; but I didn't have any personal knowledge, of inspection."

Mr. Hanley further insists that no one let him know about these breaks, whatever they were, and asserts that rather than have any feeling about the matter he would

a hundred times rather stop them. Further he insists that those breaks in the river were kept closed up, that the company had men working along this season "to specially look after them," and that some of them "apparently have been filled up with boards, and manure put up against them."

McLaren, who was in the employ of Hanley, testifies that "Generally every fall we went around with scrapers and fixed any places that were wearing out, or any breaks that come in, in the freshets, that were fixed temporarily, we would make them permanent as we could—rebuild levees."

Ryan testifies that the structure put in the break above the drain ditch was temporary, to stop the river going out; that while the water is high at all it cannot be fixed permanently; that he repaired two breaks on the east side of the river; the first below the drain ditch, which he repaired, he admits was 3 feet in depth and 12 feet in width. Ryan further testifies that Hanley directed him, along about the 3rd or 4th of April, to close up all these breaks immediately. With all this, there is small refutation of the representation of Griffing as to the amount of water escaping by these breaks in the river banks.

Beyond this testimony, the fact abundantly appears that the flood waters this year were much lighter than usual. Indeed, some of the witnesses assert that the overflow was very slight. Notwithstanding, however, large quantities of water escaped from the East fork of the river, to such extent that Hanley's section 27, upon

both the West and the East side of the channel, was abnormally flooded through the breaks and cuts in the banks, and water was escaping upon Hanley's section 35 also from like sources.

Hanley complains that the Orphan drain ditch, with its levee on the south, impeded the escape of the flood water from section 27. But its capacity was not to exceed 27 or 28 second feet, and it could not have produced the results he claims for it. Thus Hanley pleads the necessity for the opening of the drain ditch to rid his lands of the flood waters. But he himself, in my candid opinion, was responsible for the overflow of his own lands, and he cannot be heard to make a necessity for opening his drain ditch, and justify himself on that ground. He should have kept these breaks and gaps in the banks of the stream closed, or at least in very large measure. The just implications of the decree require this of him, as he is only given the flood waters to May 5th, and water pouring through rents in the banks cannot be termed flood waters.

The sixth paragraph charges Green Hudspeth and James Dalton with diverting water by means of the People's ditch contrary to the terms of the decree, and about it little need be said. The head-gate was undoubtedly opened by somebody, but I am satisfied that it was by neither Hudspeth nor Dalton, nor were they responsible for the condition. The person next to them to be benefited by the diversion is Hanley; but the proofs do not show that he had anything to do with it, nor Ryan, who was looking after his interests in that locality.

Whether the things that were done were wilfully done, that is, knowingly and purposely done regardless of the positive provisions of the decree and regardless of the rights of the plaintiff, is next to be considered.

I think Hotchkiss and Thornburg are so chargeable. This is the second affair with Hotchkiss. Luig is not, for Hanley lifts the inculcation from his shoulders. Nor is P. G. Smith. He was simply an employee of Thornburg, without purpose except to do his work.

As to Hanley, touching what he did respecting the dams on the west fork of the river, I am disposed to excuse him, on the ground that he seems to have been claiming by an independent right, not theretofore determined. But there is a fact which stands out so patent as not to be overlooked, which is that the waters of both streams, the East and West forks, were so controlled, by diversion and otherwise, that but a very small amount found its way down the natural channels, where they were wont to flow in previous years, to the lands of plaintiff, and the season went entirely by while this condition prevailed. That there was a design in this, no one can doubt. The controlling mind was that of Mr. Hanley. He reaped the benefit everywhere from the diversion, and cannot be chargeable with less than a direct purpose or design to secure benefit for himself and his company at the expense of plaintiff, or at least regardless of hurt or injury to plaintiff. This constitutes a wilful violation of the decree, and must be so held.

It is said that since the submission of this cause Hanley has permitted water to continue down the channels in such quantities that plaintiff's lands have been adequately watered, and will produce a crop. This is a generous and magnanimous impulse, but it only emphasizes the great wrong done by the diversion of the water at a time when, under the decree, plaintiff was entitled to it, as well as the perfect control Hanley seems to have exercised over it.

The finding will be that Hotchkiss may purge himself from contempt by paying the costs of plaintiff respecting this proceeding as incident to him, and, Young being made a party, by removing, in conjunction with Young, the Young dam, with leave to reconstruct the old dam at the place and in the manner defined in the original decree.

That Thornburg may purge himself from contempt by paying the costs of plaintiff incurred by reason of his having been made a party to this proceeding and by removing the new Voegtly dam. He will also be enjoined from reconstructing the old Voegtly dam.

That Hanley may purge himself from contempt, by reason of his manipulation of the 21 dam, the drain ditch, and his inexcusable and purposeful neglect to suitably repair the breaks in the banks of the East fork of the river, by paying all the rest of the costs of plaintiff incurred in instituting and maintaining this proceeding, by removing all obstructions in the 21 dam when not entitled to use it, by closing the drain ditch except at times when he is entitled to use it for drainage purposes,

as defined by the Court of Appeals, and by closing and keeping closed the breaks and gaps in the East fork of the river, appearing therein, and by paying \$250 for the use of plaintiff. This sum I consider in no way compensatory for plaintiff's loss, but I impose it by way of warning against any further contempt of the kind. *Gompers v. Bucks Stove & Range Co.*, 221 U . S. 418.

Hanley will also be enjoined from making any use of the Young and the Luig dams.

And afterwards, to-wit, on Tuesday, the 3rd day of August, 1915, the same being the 26th Judicial day of the regular July, 1915, term of said Court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

DECREE.

*In the District Court of the United States for the
District of Oregon.*

PACIFIC LIVE STOCK COMPANY,
a corporation,

Complainant,

vs.

W. D. HANLEY, F. L. MACE, H. C. LEVENS,
GEORGE WHITING, THOMAS WHITING, IONE
WHITING, JOHN C. FOLEY, N. BROWN,

J. H. BYERLY, C. P. RUTHERFORD, C. A. SWEET, M. CUSHING, P. M. McMENAMY, JOHN I. NEWMAN, CHARLES NELSON, W. H. MARRS, MANNA MARRS, JOSEPH T. BARNES, WILLIAM CLARK, C. H. VOEGTLY, GEORGE N. YOUNG, MRS. A. E. YOUNG, P. G. SMITH, GREEN HUDSPETH, JAMES DALTON, HULL HOTCHKISS, CASPER LUIG, MRS. F. E. MCGEE, PETER CLEMENS, B. R. PORTER, AND THE HARNEY VALLEY DAM, DITCH AND IRRIGATING COMPANY (a corporation),

Defendants.

and

HARRISON KELLY,

Intervenor.

No. 2577

In the matter of the contempt of William Hanley, Henry Luig, George W. Young, Hull Hotchkiss, Carey Thornburg, James Dalton, and Robert Hudspeth and P. G. Smith.

In the above entitled matter, the defendants having duly appeared and said matter having been presented by counsel for the respective parties, and submitted to the court, and the court being fully advised in the premises and having heretofore made and filed its opinion, and application being made at this time for an order in pursuance of said opinion;

Now, therefore, it is by the court considered, ordered, adjudged and decreed as follows:

1. That in the month of April, 1915, the defendant Carey Thornburg, acting under the direction and control of the defendant William Hanley, closed the Luig dam in the west fork of Silvies river in section thirty-one (31), township twenty-three (23) south, range thirty-one (31) east, by putting boards therein and by means thereof obstructing the water of the west fork of Silvies river and backed the same up the channel of said river, and by means thereof diverted in excess of forty (40) cubic feet of water of the said river, in violation of the terms of the final decree in this cause.

2. That since the entry of the final decree in said cause, the Young dam, situated in the northeast quarter of section thirty (30), township twenty-three (23) south, range thirty-one (31) east, washed out, and thereafter the defendants George W. Young and William Hanley constructed a new dam situated about one thousand (1,000) feet above the location of the old dam, which dam was not authorized by the terms of the said decree, and during the month of April, 1915, the defendants Hull Hotchkiss and Carey Thornburg constructed a new ditch taking out of the west fork of Silvies river above the said dam, and by means of said dam and ditch, and in violation of the terms of the said decree, diverted the water of the said river to the lands of the said Hotchkiss and Thornburg.

3. That in the month of April, 1915, the defendant Carey Thornburg, in violation of the terms of the said decree, placed timbers, boards, and other materials in the skeleton of the old Voegtly dam, situated near the

south line of said section thirty, and by means thereof obstructed and raised the water in said river, in violation of the terms of the said decree.

4. That since the entry of the final decree in said cause the defendant Carey Thornburg, assisted by the defendant P. G. Smith, an employee of the said Carey Thornburg, in violation of the terms of the said decree, constructed a new wooden and rock dam in the west fork of Silvies river directly above the said Voegtly dam, and by means thereof obstructed and raised the waters of the said river.

5. That during the months of March and April, 1915, and at times when it was unnecessary to drain water from the lands of the defendant William Hanley, the said defendant William Hanley, in violation of the terms of the said decree, permitted the head of the Hanley drain ditch to be open and by means thereof diverted from the east fork of Silvies river a large amount of water of the said river, and also during the months of March and April, 1915, permitted one board to remain in the Hanley dam in section twenty-one (21), and permitted and suffered a large amount of brush and debris to gather above the said dam, which obstructed and raised the waters of the said river, and diverted the same through the Hanley ditch; and also in violation of the said decree, during the months of March and April, 1915, diverted a large amount of water from said river onto his lands described in said decree by means of cuts in the banks of the said river.

6. That during the month of April, 1915, some persons permitted and suffered the headgate of the People's ditch, referred to in said decree, and situated in section thirty-one (31), township twenty-three (23) south, range thirty-one (31) east to remain open and by means thereof there was diverted a large amount of water from said river, and the same was done in violation of the terms of the said decree, but it is impossible from the evidence to determine who was responsible for the said headgate being opened as aforesaid.

7. That by reason of the premises, the court finds and decides that the defendants William Hanley, Hull Hotchkiss and Carey Thornburg are guilty of contempt of this court for the wilful violation of the terms of the final decree in this cause.

8. That the defendant Hull Hotchkiss may purge himself of the contempt by removing with the defendant George W. Young the said dam constructed near the north line of section thirty (30), township twenty-three (23) south, range thirty-one (31) east, and by paying one-eighth ($\frac{1}{8}$) of the costs incurred by complainant in this proceeding, which said one-eighth of said costs is hereby taxed and fixed at the sum of \$55.45.

9. That the defendant Carey Thornburg may purge himself of the contempt of this court by removing the old Voegtly dam and the new dam constructed by him near the south line of said section thirty (30), and by paying one-eighth ($\frac{1}{8}$) of the costs incurred by complainant in this proceeding, which said one-eighth of said costs is hereby taxed and fixed at the sum of \$55.45.

10. That the defendant William Hanley may purge himself of the contempt in this matter by removing the obstructions in the Hanley dam in section twenty-one (21), and keeping the said dam open as required by the final decree in this cause, and by closing the drain ditch so as to prevent the same from diverting water from said river or from being used except to drain surface water from the lands described in said decree, and by keeping the cuts in the banks of said river on the said property closed and in repair, and by paying the balance of the costs of complainant in this matter incurred, to-wit: six-eighths ($\frac{6}{8}$) thereof, which said six-eighths of said costs are hereby taxed at the sum of \$332.80, and by paying in addition thereto the sum of two hundred and fifty (\$250) dollars for the use of complainant, this latter sum, however, not to be considered as wholly compensatory for plaintiff's loss.

11. That the defendant George W. Young is required to forthwith remove the dam constructed by him near the north line of said section thirty (30), but he may rebuild the old dam in the northeast quarter of said section thirty, and at or near the place where the same was formerly constructed in such a manner that the water of said river shall be unobstructed thereby, except at such times as the said defendant is permitted to use the same in accordance with the terms of the said decree.

12. That the said defendant Carey Thornburg be, and he hereby is, ordered to forthwith remove from the channel of the said river the said old Voegtly dam and the said new dam constructed by him near the south line of said section thirty (30).

13. That the defendant William Hanley be and he hereby is enjoined from using said Young dam situated in the northeast quarter of section thirty (30), or the said Luig dam in said section thirty-one (31).

14. And it is further ordered that the said defendant William Hanley be, and he hereby is, commanded to forthwith remove the remains of the old bridge heretofore maintained by him over the east fork of Silvies river in section twenty-seven (27), township twenty-three (23) south, range thirty-one (31) east.

Done in open court this 3d day of August, 1915.

CHAS. E. WOLVERTON,
District Judge.

Filed August 3, 1915. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 20th day of August, 1915, there was duly filed in said Court and cause a Petition for Appeal, in words and figures as follows, to-wit:

PETITION FOR APPEAL.

*In the District Court of the United States for the
District of Oregon.*

PACIFIC LIVE STOCK COMPANY,
a corporation,

Complainant,

vs.

W. D. HANLEY, F. L. MACE, H. C. LEVENS,
GEORGE WHITING, THOMAS WHITING, IONE

WHITING, JOHN C. FOLEY, N. BROWN,
J. H. BYERLY, C. P. RUTHERFORD, C. A.
SWEET, M. CUSHING, P. M. McMENAMY,
JOHN I. NEWMAN, CHARLES NELSON,
W. H. MARRS, MANNA MARRS, JOSEPH T.
BARNES, WILLIAM CLARK, C. H. VOEGTLY,
GEORGE W. YOUNG, MRS. A. E. YOUNG,
P. G. SMITH, GREEN HUDSPETH, JAMES
DALTON, HULL HOTCHKISS, CASPER LUIG,
MRS. F. E. MCGEE, PETER CLEMENS, B. R.
PORTER, AND THE HARNEY VALLEY DAM,
DITCH AND IRRIGATING COMPANY (a corpo-
ration),

Defendants.

and

HARRISON KELLY,

Intervenor.

PETITION FOR ALLOWANCE OF APPEAL.

No. 2577.

In the matter of the contempt of William Hanley, Henry Luig, George W. Young, Hull Hotchkiss, Carey Thornburg, James Dalton, Robert Hudspeth and P. G. Smith.

The above named defendant, William Hanley, conceiving himself aggrieved by the order entered on August 3, 1915, in the above entitled matter, hereby appeals from said order to the United States Circuit Court of Appeals for the Ninth Circuit, and he prays that this his appeal may be allowed; and that citation issue as

provided by law; and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

The said defendant files herewith his assignment of errors and prays that the amount of a supersedeas bond be fixed.

C. E. S. WOOD,
LIONEL R. WEBSTER
AND ERSKINE WOOD,
Attorneys for Def't Wm. Hanley.

It is hereby ordered that the appeal be allowed as prayed for, and the amount of the supersedeas bond is fixed at One Thousand Dollars (\$1,000.00).

CHAS. E. WOLVERTON,
U. S. District Judge.

Dated August 19, 1915.

Due service of the within petition for allowance of appeal by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, August 20th, 1915.

WIRT MINOR,
of Attorneys for Complainant.

Filed August 20, 1915. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 20th day of August, 1915, there was duly filed in said court, and cause, an assignment of errors in words and figures as follows, to-wit:

*In the District Court of the United States for the
District of Oregon.*

PACIFIC LIVE STOCK COMPANY,

a corporation,

Complainant,

vs.

W. D. HANLEY, F. L. MACE, H. C. LEVENS,
GEORGE WHITING, THOMAS WHITING, IONE
WHITING, JOHN C. FOLEY, N. BROWN,
J. H. BYERLY, C. P. RUTHERFORD, C. A.
SWEET, M. CUSHING, P. M. McMENAMY,
JOHN I. NEWMAN, CHARLES NELSON,
W. H. MARRS, MANNA MARRS, JOSEPH T.
BARNES, WILLIAM CLARK, C. H. VOEGTLY,
GEORGE W. YOUNG, MRS. A. E. YOUNG,
P. S. SMITH, GREEN HUDSPETH, JAMES
DALTON, HULL HOTCHKISS, CASPER LUIG,
MRS. F. E. MCGEE, PETER CLEMENS, B. R.
PORTER, AND THE HARNEY VALLEY DAM,
DITCH AND IRRIGATING COMPANY (a corpo-
ration),

Defendants.

and

HARRISON KELLY,

Intervenor.

ASSIGNMENT OF ERRORS.

No. 2577.

In the matter of the contempt of William Hanley, Henry Luig, George W. Young, Hull Hotchkiss, Carey Thornburg, James Dalton, and Robert Hudspeth and P. G. Smith.

I.

The court erred in overruling the exception of the defendant, William Hanley, to the affidavit of John Gilcrest, the ground of the exception being that the affidavit did not state that the facts therein charged were within the personal knowledge of the affiant, and if they were not, did not show the sources of this information.

II.

The court erred in finding that the closing of the dam in section 31, township 23 south range 31 east, by Carey Thornburg, under the direction of William Hanley, and the consequent diversion of water from the west fork of Silvies river, was a violation of the terms of the final decree in this cause.

III.

The court erred in finding that the defendant, William Hanley, had permitted the head of the Hanley drain ditch to remain open at any times when it was unnecessary to drain water from the lands of the William Hanley Company.

IV.

The court erred in finding that the defendant, William Hanley, had permitted a board and a large amount of brush and debris to remain and gather in the Hanley dam in section 21, which raised and obstructed the water in the river.

V.

The court erred in finding that the defendant, William Hanley, during March and April, 1915, diverted a large amount of water from Silvies river, on to his lands described in the final decree, by means of cuts in the bank of said river.

VI.

The court erred in finding and adjudging that the defendant, William Hanley had wilfully violated the terms of the final decree in this cause, and that he was therefore guilty of contempt of court.

VII.

The court erred in requiring the defendant Hanley, in order to purge himself of contempt, to do, among other things, the following, to-wit: to keep closed and in repair the so-called cuts in the banks of said Silvies river, on the lands of the Wililam Hanley Company.

VIII.

The court erred in requiring the defendant, George W. Young, to remove the dam near the north line of

section 30, this dam being the property of the William Hanley Company.

IX.

The court erred in enjoining the defendant, William Hanley, from using the so-called Young dam situated in the northeast corner of section 30, and the so-called Luig dam in section 31.

X.

The court erred in making and entering its order of August 3, 1915, adjudging and decreeing the defendant, William Hanley, in contempt, and erred in finding that he was guilty of any contempt whatever, either wilful or otherwise.

C. E. S. WOOD,
LIONEL R. WEBSTER
AND ERSKINE WOOD,
Attorneys for Defendants.

Due service of the within assignment of errors by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, August 20th, 1915.

WIRT MINOR,
of Attorneys for Complainant.

Filed August 20, 1915. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 20th day of August, 1915, there was duly filed in said court, and cause, a bond on appeal, in words and figures as follows, to-wit:

BOND ON APPEAL.

*In the District Court of the United States for the
District of Oregon.*

PACIFIC LIVE STOCK COMPANY,

a corporation,

vs.

W. D. HANLEY ET AL.

In the matter of the contempt of William Hanley,
et al.

Know All Men by These Presents, That we, National Surety Company, of New York, are held and firmly bound unto the above named Pacific Live Stock Company in the sum of (\$1000.00) One Thousand Dollars, to be paid to the said Pacific Live Stock Company, its successors or assigns, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated August 20th, 1915.

Whereas, the above named William Hanley has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the order and decree in the above entitled cause by the District Court of the United States for the District of Oregon, made and entered August 3, 1915.

Now, therefore, the condition of this obligation is such, that if the aboved named William Hanley shall

prosecute said appeal to effect, and answer all costs and damages if he shall fail to make good his plea, than this obligation shall be void; otherwise to remain in full force and virtue.

Signed, sealed and delivered in presence of

CLARENCE D. PORTER.

L. A. WEST.

NATIONAL SURETY COMPANY,

By J. C. AINSWORTH,
Resident Vice President.

Attest: JAS. McI. WOOD,
Resident Assistant Secretary.

Countersigned:

JAS. McI. WOOD & Co., Agents.

By JAS. McI. WOOD,
One of the firm.

Approved: August 20, 1915.

CHAS. E. WOLVERTON,
Judge.

Filed Aug. 20, 1915.

C. H. Marsh, Clerk.

And afterwards, to-wit, on Friday, the 12th day of November, 1915, the same being the 11th Judicial day of the regular November, 1915, term of said court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER DESIGNATING RECORD
ON APPEAL.

*In the District Court of the United States for the
District of Oregon.*

PACIFIC LIVE STOCK COMPANY,

Complainant.

vs.

W. D. HANLEY ET AL.,

Defendants.

and

HARRISON KELLEY,

Intervenor.

In the matter of the contempt of William Hanley, Henry Luig, George W. Young, Hull Hotchkiss, Carey Thornburg, James Dalton, Robert Hudspeth and P. G. Smith.

The appellant, by his attorney Erskine Wood, and the appellee by its attorney, Mr. Wirt Minor, having this day appeared for the purpose of submitting their differences as to the general contents of the record on appeal in this cause,

It is now ordered that the transcript on appeal which shall be printed, shall comprise the following:

Stipulation for the use on this appeal of the complaint and final decree in the original cause, both of which have already been printed and are on file in the Circuit Court of Appeals for the Ninth Circuit, in the

cause numbered in that court 2036; all of the affirmative part of the answer of defendant W. D. Hanley to the original bill of complaint, to-wit: Commencing at line 22 on page 162 of part 1 of the judgment roll, in the original cause, and extending to the end of said answer; the affidavit of John Gilcrest sworn to on the 26th day of April, 1915; the order, based on said affidavit, to defendant Hanley to show cause why he should not be adjudged in contempt; defendant Hanley's motion and affidavit sworn to on the first day of May, 1915; statement of the evidence as prepared by the appellant and lodged with the Clerk of this court; Def. Exhibits A and B filed May 12, 1915, the opinion of Judge Wolverton in this cause, and the decree of August 3d adjudging defendant Hanley in contempt; defendant Hanley's petition for the allowance of appeal; assignments of error, citation on appeal, supersedeas appeal bond; the various orders extending the time to the parties hereto for settling this record on appeal and for having said record printed; the order directing that the testimony on this appeal may be reproduced in the exact words of the witnesses; and this order; Complainants Ex. 4, filed December 17, 1910.

It is further ordered that the opinion of Judge Bean in the original contempt case against George W. Young, and the opinion of Judge Bellinger, filed Feb. 21, 1905, in the first contempt proceeding against W. D. Hanley be printed as addenda.

It is further ordered that the whole of the record in this cause, or such parts thereof as the parties may desire, shall be sent to the Circuit Court of Appeals for the

Ninth Circuit to be considered on this appeal and supplement the printed record above ordered.

Dated this 12th day of November, 1915.

CHAS. E. WOLVERTON,
Judge.

Filed November 12, 1915. G. H. Marsh, Clerk.

And afterwards, to-wit, on Friday, the 12th day of November, 1915, the same being the 11th Judicial day of the regular November, 1915, term of said court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER PERMITTING TESTIMONY TO BE
REPRODUCED IN EXACT WORDS
OF WITNESS.

*In the District Court of the United States for the
District of Oregon.*

PACIFIC LIVE STOCK COMPANY,
Complainant.

vs.

W. D. HANLEY ET AL.,
Defendants.

and

HARRISON KELLEY,
Intervenor.

In the matter of the contempt of William Hanley, Henry Luig, George W. Young, Hull Hotchkiss, Carey Thornburg, James Dalton, Robert Hudspeth and P. G. Smith.

At the request of Erskine Wood, of solicitors for the appellant, it is hereby ordered that the testimony to be included in the transcript on this appeal shall be reproduced in the exact words of the witnesses.

Dated this 12th day of November, 1915.

CHAS. E. WOLVERTON,

Judge.

Filed November 12, 1915. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 29th day of November, 1915, there was duly filed in said court, the statement of the evidence, in words and figures as follows, to-wit:

EVIDENCE.

*In the District Court of the United States for the
District of Oregon.*

PACIFIC LIVE STOCK COMPANY,
a corporation,

Complainant,

vs.

W. D. HANLEY, F. L. MACE, H. C. LEVENS,
GEORGE WHITING, THOMAS WHITING, IONE

(Testimony of W. A. Griffing.)

WHITING, JOHN C. FOLEY, N. BROWN,
J. H. BYERLY, C. P. RUTHERFORD, C. A.
SWEET, M. CUSHING, D. M. McMENAMY,
JOHN I. NEWMAN, CHARLES NELSON,
W. H. MARRS, MANNA MARRS, JOSEPH T.
BARNES, WILLIAM CLARK, C. H. VOEGTLY,
GEORGE N. YOUNG, MRS. A. E. YOUNG,
P. G. SMITH, GREEN HUDSPETH, JAMES
DALTON, HULL HOTCHKISS, CASPER LUIG,
MRS. F. E. MCGEE, PETER CLEMENS, B. R.
PORTER, AND THE HARNEY VALLEY DAM,
DITCH AND IRRIGATING COMPANY (a corpo-
ration),

Defendants.

and

HARRISON KELLY,

Intervenor.

In the matter of the contempt of William Hanley,
Henry Luig, George W. Young, Hull Hotchkiss,
Carey Thornburg, James Dalton, Robert Hudspeth,
and P. G. Smith.

W. A. GRIFFING,

A civil engineer in the employ of the Pacific Live Stock Company. During the months of March and April, 1915, and up to the present time he has been employed in Harney Valley in gathering information in connection with the adjudication of the water rights on Silvies river.

(Testimony of W. A. Griffing.)

DIRECT EXAMINATION.

Questions by Mr. Treadwell.

Q. Now, going to the east fork of the river, do you know the Hanley drain ditch?

A. Yes.

Q. It is marked on that map, is it, the location of it?

A. Yes, it is marked here.

Q. In what section?

A. It is taking out of the river in the northeast quarter of section 27, same township and range. (Township 23 south, Range 31 east, Willamette meridian.)

Q. Did you have any occasion to examine that ditch, as to whether or not it was diverting water during the period you have covered by your testimony?

A. Yes.

Q. Was it diverting the water from the river?

A. Yes, it was diverting water from the river.

Q. How much water was it diverting?

A. 30 second feet.

Q. You measured that water, did you?

A. I measured the water personally, yes, sir.

Q. When was it that you saw it doing that, Mr. Griffing?

A. The first measurement I took was on April 3rd. I had seen the water in the ditch running over the head-gate, though, previous to that, several days.

Q. Did you actually measure it on April 3rd?

A. April 3rd and April 8th.

Q. Both times it was taking this 30 feet of water?

(Testimony of W. A. Griffing.)

A. Both times it was taking about 30 second feet of water.

Q. Was it subsequently closed, Mr. Griffing?

A. Yes, it was closed after that.

Q. How was it closed?

A. Closed by putting additional flash boards in the headgate, and stuffing up with straw.

Q. That was done after the 8th day of April this year? Do you know the Hanley upper ditch on 21—ditch and dam?

A. Yes.

Q. That is situated in Section 21 of the same township?

A. Yes, in the northwest quarter. Takes out of the river in section 21, same township and range.

Q. And on the east side of the river?

A. East fork of the river.

Q. Did you examine that during this period to see whether it was taking the water of the river?

A. Yes.

Q. What did you find?

A. I found it was taking water.

Q. About what amount of water did it take, the average amount?

A. The average amount would be very close to 40 second feet.

Q. Forty second feet? During what period was that, Mr. Griffing?

A. That was from the first of April up until the first of May—3rd of May.

(Testimony of W. A. Griffing.)

Q. Did you also examine the Hanley dam, immediately below that ditch?

A. Yes.

Q. What condition did you find that dam in?

A. I found it holding the water up, about a foot by means of brush, which had been lodged in front of it, and one board.

Q. One board?

A. One board.

Q. There are several openings in that dam, are there, Mr. Griffing?

A. Yes, sir, there are four openings.

Q. Across one of these openings you mean there was a board?

A. Yes.

Q. Against the others there was brush?

A. Brush.

Q. What did that brush look like? Any particular examination did you make of it?

A. The brush, some of it had evidently been dead brush and floated down the river, others had the appearance of being cut, either with an axe, hatchet, or something of the kind.

COURT: And thrown in there?

A. Evidently; it had that appearance, had been cut—cut diagonally across the limb of the tree, and was then in the river.

Q. How long did the dam remain in that condition, Mr. Griffing?

(Testimony of W. A. Griffing.)

A. About the first part of April, until the 25th or 26th; something of that kind, or about that time.

COURT: How many openings did you say were in the dam?

A. Four openings in the dam.

COURT: How many contained boards in them?

A. One opening had the boards in them.

COURT: All the other openings contained this brush?

A. Yes, sir. Well, the one with the board in contained brush in front of it.

COURT: You think that raised the water about a foot?

A. Just about a foot, yes.

Q. Did you take observations?

A. I took the observations. It averaged from nine-tenths of a foot to one foot.

Q. That is situated how close below the head of this Hanley upper ditch?

A. It is just immediately below.

MR. WEBSTER: I didn't get the date. He said about the first of April to when?

A. About the 25th of April.

Q. Did you also examine the river down through the Hanley property, as to any other place where water was being diverted?

A. Yes. All along the banks of it, at both sides.

Q. The water was being diverted on both sides down through his property?

(Testimony of W. A. Griffing.)

A. Yes, down through his property.

Q. By what means?

A. By breaks or cuts in the bank. That is, they had the appearance of being cut.

COURT: That was down below this dam?

A. That was down below this dam, yes, we were speaking of.

Q. State the first and the biggest one you have referred to.

A. The first one would be on the right bank of the river, about 1,000 feet above the intake of the Hanley drain ditch on the right bank of the river.

Q. That would be the west bank?

A. It would be the west bank.

Q. That is in Section 27?

A. That is in Section 27, yes.

Q. How much water was being diverted by that, about?

A. As near as I could get it, about 50 second feet.

Q. Fifty second feet?

A. Yes.

Q. What other cut, specifically, are you able to locate?

A. Then below the drain ditch, 900 feet or 1,000 feet, on the left bank, that would be on the east bank of the river, there was a large break there, taking out about 50 second feet of water. Below that again, in the same section, there was another cut taking about $5\frac{1}{2}$ or 6 second feet of water. And then in Section 35, there was another cut, or a ditch, rather, taking out there, that the

(Testimony of W. A. Griffing.)

boards had been in. It was in very bad shape, and was taking about five second feet of water.

Q. Besides these specific ones, were there, or were there not, other small places you didn't mention?

A. There were numerous smaller ones that I couldn't get measurements of, or an estimate of.

Q. After the water had been diverted by the upper Hanley ditch, and by the drain ditch, and by these various cuts that you have referred to, did Hanley have any method of taking the balance of the water out of the river below that?

A. Yes, below that; yes.

Q. By what method did he do that?

A. He had a dam in Section 3.

Q. That is Section 3 of the adjoining township?

A. Of the adjoining township.

MR. WOOD: Just a moment. We object to that as irrelevant and immaterial to this case, being on the Fennimore property, which has already, in a former contempt case, been held by Judge Bellinger as not in the decree, and therefore it could not be tried out in a contempt proceeding.

MR. TREADWELL: We haven't charged anything in regard to that, your Honor, but we want to put it in evidence, for the purpose of showing that during this time Mr. Hanley was not attempting to drain his land, but was irrigating his land and forcing the water over it, in answer to his contention that he had to drain the water out, and that was the reason he was allowing

(Testimony of W. A. Griffing.)

40 feet of water to go down through the drain ditch. We don't charge it as a specific item of contempt. That is the only purpose we want the evidence in for.

MR. WOOD: We object to it, on the ground their affidavit amounts to an information, and nothing can be heard or tried in this case except those things alleged in the information, to which our attention has been invited. They cannot under pretense of illustration, or some other purpose, put us upon trial on a matter they have not made an issue themselves.

COURT: I will hear the testimony.

Q. Answer the question.

A. There is a dam in Section 3, in the northeast quarter of Section 3, which was then diverting all the balance of the water that was going on down the river.

Q. So that below that, the Pacific Live Stock Company received no water whatever?

A. Not from that fork of the river, no.

Q. Now, have you taken some photographs of the various things that you have spoken of?

A. Yes, sir.

* * * * *

Q. I will ask you if you have a picture showing the Hanley drain ditch, as you have testified.

A. Yes. (Witness produces Picture No. 8. "Hanley drain ditch at head.")

Q. Does that water that is there being pictured, flow out of the river, and through the headgate, and down through the drain ditch?

(Testimony of W. A. Griffing.)

A. Yes, that is the water from the river.

Q. When was that picture taken, Mr. Griffing?

A. That was taken on the 8th of April.

Q. Referring to the affidavit of Mr. Hanley, which says that no water was taken through that drain ditch after the middle of March, I will ask you when you bought the camera that took that picture?

A. I bought the camera during the first part of April—after the first of April, I know.

Q. So you didn't own that camera at all, didn't take any pictures until after the first day of April?

A. Until after the first of April, yes.

COURT: Is that dam so constructed that that water can be shut off entirely?

A. Yes.

Q. It was shut off entirely?

A. It was shut off between the 8th and the 12th some time.

MR. WOOD: The 8th and the 12th of what?

A. April.

Q. Now, have you another picture of that drain ditch?

A. Yes, showing the head on the river side, the entrance to the old dam. (Witness produces No. 9.)

COURT: From what direction was this taken?

A. That was taken from the river side, looking down the drain ditch.

Q. So the stop gate that is really regulated is the second one away from the river, is it?

(Testimony of W. A. Griffing.)

A. Yes.

Q. That was the one that was ultimately closed?

A. That is the one that was ultimately closed; not the first one.

Q. Now, have you got a picture of the Hanley "21" dam that illustrates your testimony as to its condition?

A. Yes, sir.

Q. (Witness here produces Photo No. 10.)

COURT: What do you mean by "21"?

A. That is in Section 21. That is the one where the board was.

Q. Which side of the river was the board in?

A. On the right-hand bank. It is on the left-hand side of the picture.

COURT: This is the one that had the four openings, and you found brush in the other three?

A. Yes.

* * * * *

Q. Did you also take a picture of the break in the bank or cutting in the bank that you have referred to, above the drain ditch?

A. Yes.

MR. TREADWELL: (Witness here produces No. 15, illustrating that cut.) Was that cut subsequently closed, Mr. Griffing, or not?

A. It was closed, but all the water was not shut off. The water was going around between the boards.

Q. Mr. Hanley states that he closed those cuts. When was that picture taken?

(Testimony of W. A. Griffing.)

A. It was taken on the 20th of April.

Q. That was the condition of the water running out at that time?

A. At that time, yes.

COURT: How much water was running out at that time?

A. About 50 second feet.

COURT: Was there that much water going through there at that time—50 second feet.

A. Yes, sir. That is not a measurement. That is as close as I could measure it by that measure.

COURT: That is a good sized stream of water, isn't it?

. Q. Yes, you can see by the way it is running.

MR. WEBSTER: Which one is this?

A. That, I think, is about 1,000 feet above the drain ditch, and on the right bank of the river, as you look down the river, on the east bank of the river.

MR. WOOD: That would be the left bank?

A. No, the right bank, as you go down. That is on the west bank of the river, I should have said.

MR. WOOD: It is on the right bank as you *do* down. That would be the west bank?

A. The west bank of the river, yes.

Q. I want to be sure we get these right. The one you have referred to now as a break 900 feet below the drain ditch.

A. Below the drain ditch. I have no picture of that.

(Testimony of W. A. Griffing.)

Q. Isn't that the one that had the largest amount of water in it? I am not sure.

A. Yes, it had about the same, as nearly as I could get it at that time. The measurement of the one below the drain ditch was taken before this one.

Q. But you have no picture of that?

A. I have no picture of that.

MR. WEBSTER: That was in 35, wasn't it?

A. That is Section 27, I think. That would be in Section 27.

COURT: How much water was going out of that?

A. Fifty second feet.

COURT: As much as the other of which you have a picture?

A. Yes.

MR. WOOD: I didn't understand which side of the river was the break below the drain ditch in 27, the east or west side?

A. On the east side of the river, in Section 27, below the drain ditch.

MR. WEBSTER: And the other is above the drain ditch?

A. On the west side of the river.

MR. WOOD: All your testimony relates to the east fork.

A. To the east fork of the Silvies river, yes.

* * * * *

Q. You know the old bridge that is referred to?

(Testimony of W. A. Griffing.)

A. Yes.

Q. Did you take a picture of that old bridge?

A. I took a picture of that also, yes, sir.

Witness here produces Photo No. 18.

Q. I will ask you when you took that.

A. That picture was taken April 20th.

Q. Will you describe, for the Court, the condition of that bridge?

A. There are the old stringers of a bridge still left in the river, some of them below the surface of the water, holding up a quantity of tules and portions of boards. It acted as a dam, to a certain extent.

Q. Did you also take a picture immediately above that, showing the effect it had on the diversion of the water?

A. Yes.

Q. Will you produce that, Photo No. 19? (Witness does so.) Does that correctly show?

A. That shows one of numerous small cuts just above the bridge. I didn't get but one picture.

Q. Have you got another picture there, No. 20, of a cut in the channel or bank, or what is that?

A. Yes, I have another cut, on the east bank of the river, very close to the southeast corner of Section 27. It would be right in here (referring to map.)

Q. But it is on the east side?

A. It is on the east bank of the river.

Q. Does this show the water in the foreground—is the river, is it not?

(Testimony of W. A. Griffing.)

A. The water in the foreground is the river.

Q. The cut in the bank is the one that goes off to the right-hand side of the picture?

A. Off to the right-hand side of the picture, yes. There were some stakes and boards driven down in there. The water was going through them and around them.

Q. Did you testify specifically about the quantity of water that was going out?

A. About $5\frac{1}{2}$ second feet of water at the time.

MR. WEBSTER: Where was that you are telling about now? Is that in 27, or down in 35?

A. That is very close to the corner of 27 and 35.

MR. WEBSTER: Right there by the Orphan headgate?

A. Yes, just above the Orphan headgate a ways.

Q. Did you take a picture of another break below the Orphan headgate?

A. There is a ditch below the Orphan headgate that I have a picture of showing the water.

Q. About where was that located? Do you know where that was taken, Mr. Griffing?

A. That is about half a mile down the river, on the east bank, and in Section 35.

Q. Section 35?

A. Yes.

Q. It takes water to the east of the river?

A. Yes, in Section 35.

Q. This is a picture of it?

A. This is a picture of it. There were about $5\frac{1}{2}$

(Testimony of W. A. Griffing.)

or 6 second feet of water flowing through it at that time.

MR. WEBSTER: At what time?

A. That was April 20th.

Q. Now, Mr. Griffing, there has been referred to here a ditch belonging to the Pacific Live Stock Company, known as the Orphan ditch and headgate. You know the location of that?

A. Yes, I know the location of that.

Q. Would you state to the Court where it is located, substantially?

A. The headgate takes out of the river in the northeast quarter of Section 34—the northeast corner of the quarter.

Q. Does the company have any dam in the river at all?

A. No dam in the river whatsoever.

Q. There is a headgate?

A. Headgate taken out.

Q. Which direction does the ditch run then?

A. Flows westerly.

Q. Due west the first part of it?

A. The first part of it goes northwesterly for a short distance, then due west till it gets into Section 33; then it runs southwesterly then.

Q. So, as I understand it—to get it in the record—it runs from the river diagonally to near the north line of Section 34—is that correct?

A. That is correct.

(Testimony of W. A. Griffing.)

Q. Then runs along the north line of 34 into 33?

A. Into Section 33, yes.

COURT: Who owns Section 33?

MR. TREADWELL: The Pacific Live Stock Company.

Q. Then it goes through Section 33?

A. Yes.

Q. Is there also a branch of it running through Section 34?

A. There is a branch running through Section 34.

Q. Now, which side of that ditch, as it goes along the north line of 33 and 34, is the bank of the ditch?

A. On the south side of the ditch.

Q. That would be, as it is generally known, the lower side of the ditch.

A. The lower side of the ditch, yes.

Q. The way the country is formed there, Mr. Griffing, is it possible for any water diverted from the head of that ditch to flow out, and over any of the land of Mr. Hanley, in Section 37?

A. No.

Q. Nor there was no water being diverted by Mr. Hanley onto his Section 27. Did you open that ditch to show its capacity?

A. Yes.

Q. Did any of that water overflow up onto the hill?

A. No, sir, it couldn't do it. This was large enough to contain all the water that could possibly be taken from the Orphan headgate.

(Testimony of W. A. Griffing.)

Q. Before that time, and while the water was being diverted out onto Section 27, onto the Hanley land, will you state what was the relative amount of water diverted by the Pacific Livestock Company in at the head of that ditch, and the amount that flowed in it from Mr. Hanley's land, down near the southwest corner of Section 27?

A. There was about 17 cubic feet per second, flowing through the Orphan headgate, and after the water from Section 27 came into the ditch, the ditch was carrying 90 second feet of water.

Q. That was picked up, then, from the flow that came over Section 27, from the various points that you have mentioned?

A. Yes.

Q. What is the greatest amount of water that you were able to force through the Orphan ditch when you opened it wide?

A. 28 second feet.

Q. Now, have you got a picture of the Orphan headgate?

A. Yes.

Q. Will you produce it? (No. 22 is produced by witness.)

A. That is the intake from the river side.

Q. That is a picture of the intake from the river side?

A. Yes.

Q. Did you also take a picture of the Hanley field, or two pictures of it during the time the river was overflowing?

(Testimony of W. A. Griffing.)

A. Yes.

Q. One picture?

A. One picture.

Q. At the time the river was coming out onto Section 27 and coming down toward the Orphan ditch?

A. Yes.

Q. Does this correctly show Mr. Hanley's Section 27, and the water on it?

A. It does—a very good picture of it.

Q. That is all water, is it?

A. Yes.

Q. About how deep was the water on Section 27 during that period?

A. I should judge as deep as I got into it, about a foot and a half the deepest—over my boots.

COURT: That is ——

A. Directly north of the Orphan ditch.

COURT: Does that extend west into Section 28? I mean this water?

A. Well, some very little of it, very little of it then at that time.

Q. That was taken on April 20th, was it?

A. It was taken on April 20th.

Q. After that did Mr. Hanley shut up the cuts that were taking the water onto Section 27?

A. Yes, practically all of them.

Q. After he had done that, and the water had drained off, did you then open the Orphan ditch to its full capacity?

A. I did.

(Testimony of W. A. Griffing.)

Q. Did you take a picture of the Orphan ditch?

A. Yes.

Q. This picture produced is No. 24. Which side of the ditch was that land on?

A. That would be on the north side of the ditch.

Q. The land that is shown there north of the ditch?

A. North of the ditch in Section 27.

Q. So the land that is here shown is the Hanley land?

A. Yes.

Q. This shows the water flowing?

A. Except in the immediate foreground, as taken, in the corner. That shows a little corner that belongs to the Pacific Live Stock Company; the balance is William Hanley's.

Q. This shows water in the ditch?

A. Yes.

Q. None of that flowed onto the Hanley land?

A. Not a particle of it.

Q. Did you also take a separate picture of Hanley's land while the ditch was running full capacity?

A. That is the only picture I took of it. That shows the land when the ditch was running to its capacity."

* * * * *

"Q. About what would you say was the average amount diverted by the Pacific Live Stock Company through the Orphan ditch during the months of March and April, that you have testified to, on an average, at the head?

(Testimony of W. A. Griffing.)

A. It wouldn't average at most over 17 or 18 second feet.

Q. Now, beside the obstructions that you have mentioned, were there any other obstructions in the river on the Hanley property, that you found there?

A. No. I don't remember any."

* * * * *

CROSS EXAMINATION.

"Q. Now, the water which flows over the bank—leaving for a moment, however, it gets over—in section 27 would naturally, if it was not for the Orphan Head-gate ditch, flow down over Section 34, wouldn't it?

A. Yes, most of it.

Q. And that is on the company's property, isn't it?

A. Yes.

Q. All of the water that flows over in Section 27 gets onto the company's property, doesn't it? Flows over the bank?

A. Well, the majority of it, yes.

Q. Well, what of it don't get over there?

A. Some of it would go onto Section 28.

Q. On Section 28?

A. Yes.

Q. Well, there would be mighty little of it.

A. Yes, very little of it.

Q. And all of the water that would flow over the west side in 27, would run right into the Orphan Head-gate ditch, wouldn't it?

(Testimony of W. A. Griffing.)

A. Yes.

Q. And would all be carried off by that ditch, wouldn't it, on the company's property?

A. Yes, if the ditch was large enough to carry all of it.

Q. Yes, if the ditch was large enough to carry it. I take it for granted, of course, it would carry it. That I don't think it is necessary to mention. But you were putting water through the Orphan Headgate at a time when there was sufficient water overflowing the bank on 27 to fill the ditch, weren't you?

A. Not all the time. The headgate was closed part of the time.

Q. Well, part of the time?

A. Part of the time, yes.

Q. Grant that it is true that the water in flowing in the Orphan Headgate ditch from the river would not overflow Section 27, yet the water overflowing Section 27 would be held back by water which you put into the ditch, wouldn't it, and would not be taken off. In other words, if you hadn't put any water in your ditch from the river in the Orphan Headgate ditch, it would have carried off the water on 27, to the extent of its capacity?

A. To the extent of the ditch's capacity, yes.

Q. If there was enough water coming from 27, from the bank of the river, to fill the Orphan Headgate ditch, there would not be any necessity for bringing any in from the river, would there?

A. Not if the ditch was carrying all it would hold.

(Testimony of W. A. Griffing.)

Q. And you say that there were times when the ditch would not carry the water that came over 27?

A. Yes.

Q. And at the same time, there was water coming through the Orphan Headgate, wasn't there?

A. At times, yes.

Q. Well, this water that came over—I speak of the west side of 27, of course—the water that came over there, all of it went right down on the company—all except a little that might have gone on 28?

A. I didn't follow it all the way down, but it immediately went into the Orphan ditch, yes.

Q. Well, then, you don't mean to say, or to convey the impression that water which overflowed the banks on 27 was lost to the company, do you?

A. Well, I don't know whether all of it was, or not, because I didn't follow it down to see where all of it was going.

Q. Well, it answered the same purpose, so far as the effect was concerned, as the water that came from the Orphan Headgate ditch, didn't it?

A. A certain amount of it, yes.

Q. All of it that the Orphan Headgate would carry?

A. Yes."

* * * * *

"Q. I want to ask you a little more about the drain ditch there. You say that ditch was open?

A. Water was pouring over the stop gate in it, yes.

(Testimony of W. A. Griffing.)

Q. Well, which stop gate? You don't refer to the one down right close to the river there, where the bridge is—you don't refer to that as the stop gate, do you?

A. There is no bridge across the drain ditch at the edge of the river.

Q. Isn't there?

A. No.

Q. Well, they have taken it away, then? You know there are some boards there?

A. Yes, there are some old boards there.

Q. You don't mean that as the stop gate?

A. No, it is below that.

Q. You mean below that? It is a substantial structure, isn't it?

A. Yes, sir.

Q. A good substantial structure for a stop gate in the ditch, isn't it?

A. Yes.

Q. Even if Hanley did build it, it is all right, isn't it?

A. It has the appearance of being good.

Q. You say the water was pouring over the boards in it?

A. Yes.

Q. Were all the boards in?

A. No, there were boards on the bank.

Q. What?

A. There were boards that were out lying on the bank.

(Testimony of W. A. Griffing.)

Q. It is constructed substantially like all the other dams there—frame work with movable boards?

A. Yes.

Q. They are all—the company and everybody else builds on the same general plan, don't they?

A. Apparently, yes.

Q. There were how many boards out of it at the top?

A. I don't know.

Q. Did you go there?

A. I was right there. That was laying on the top of the ground?

Q. No, I don't care how many were on top of the ground. How many more would it have taken to put in to complete the dam?

A. Well, at least two boards. That would be four boards, two on a side. There are two openings.

Q. And it would take two more boards put in there to make it complete?

A. To make it tight, yes. At least that many.

Q. What is the width of those boards?

A. I believe they are six inch boards—two by six.

Q. So it required 12 inches more?

A. Yes, at least that, because the water would back up.

Q. And the water was pouring over there?

A. Yes.

Q. Was there water down on 35 at that time, below the drain ditch and in 27?

A. Yes, some.

(Testimony of W. A. Griffing.)

Q. Overflowing the banks there, wasn't it, covering a good deal of 35 and part of 24, east of the river?

A. Yes, water was overflowing the banks there.

Q. And did you take a photograph of that—I have forgotten. I guess you did.

A. Yes, a photograph of the headgate.

Q. How long did that remain in that condition?

A. Water pouring over the boards in the drain ditch?

Q. Yes.

A. Well, the only dates I have on it was from the 3rd until the 8th.

Q. The 3rd till the 8th of April?

A. Yes. But it was running over there before, but I hadn't taken the measurement before that.

Q. But after the 8th it was closed?

A. Some time between the 8th and the 12th I was there again, and it was closed. I was there on the 12th.

Q. These two additional boards had been put in, and that shut it all off?

A. Yes.

Q. You were, of course, in making all these observations, doing all of this work for the Pacific Live Stock Company, for which you were employed?

A. Yes.

Q. And in their service, and in their interest, you went and made these various observations and measurements, and then took the photographs and all having been done for that purpose?

A. Yes.

(Testimony of W. A. Griffing.)

COURT: Would water going down the drain ditch benefit Mr. Hanley?

A. Why, I think so, greatly, yes.

COURT: In what way?

A. Getting the water spread out over those sections of the country it irrigated.

COURT: Does the water spread out as it comes out the drain ditch, or does it pass off?

A. It will spread out over the land.

Q. Do you mean to say the water from this drain ditch, after it gets into the drain ditch, spreads out over Mr. Hanley's land?

A. It was apparently doing so at that time.

Q. Where was the water running out from the drain ditch below the headgate at the time you speak about?

A. I didn't follow it down. There was too much water there.

Q. Do you know, as a matter of fact, that there was a solitary inch of water going out of that drain ditch over Hanley's properties at that time?

A. No, I do not.

Q. Well, if you made any observations of that drain ditch down there, don't you know as a fact that there was no water going out of that drain ditch over Mr. Hanley's property?

A. No, I don't know that either.

Q. Well, you didn't make much of an observation of it, then, did you?

(Testimony of W. A. Griffing.)

A. Not at the lower end, no.

Q. Well, you don't mean to tell me that the water flowing over that headgate that would go through there by reason of the absence of these two six-inch boards, would anywhere near fill the drain ditch, would it?

A. I don't know the capacity of the drain ditch.

Q. Did you look at it and see?

A. It had the drain ditch filled, yes. Immediately below the headgate, the drain ditch was full.

Q. But it was not running over?

COURT: The Bank?

MR. WEBSTER: Yes.

Q. How far down did you examine?

A. Not over a quarter of a mile.

Q. Did you ever follow that drain ditch on down?

A. No, there was water in there at that time, and I could not follow it down.

Q. Do you know whose property the drain ditch goes onto, after it leaves Mr. Hanley's property?

A. No, I do not; not all of them.

Q. Well, do you know anybody's that it goes on? Whose does it go on immediately after it leaves Mr. Hanley's?

A. I don't know.

Q. You don't know that it goes directly from Hanley's property onto the property of the Pacific Live Stock Company, then?

A. No, I do not.

Q. And delivers every drop of water that runs

(Testimony of W. A. Griffing.)

into it onto the Pacific Live Stock Company's properties. You don't know that?

A. No.

Q. And never does deliver a drop of water out of that ditch onto Hanley's properties? You don't know that either, do you?

A. I do not, no.

Q. Ever since that it has been closed up?

A. So far as I know, yes.

Q. Well, you have been along there a good deal, haven't you?

A. Every few days, yes.

MR. TREADWELL: He Doesn't know what has been done since he left there.

MR. WEBSTER: Of course. I naturally am trying to apply a little common sense to this.

Q. Now, you say, referring again for a minute to the Orphan headgate, that there is no dam in the river there at all?

A. Immediately below it?

Q. Yes.

A. No, not that I know of.

Q. What is the width of that headgate—the width of that in the clear, inside?

A. 7.6 feet.

Q. And it is cut right into the bank of the river, isn't it?

A. The headgate is right in the bank of the river, yes.

(Testimony of W. A. Griffing.)

Q. And the lower part of the headgate is on a level with the bottom of the river at that point?

A. No.

Q. Almost, isn't it?

A. No, I think not.

Q. What is the difference?

A. I couldn't say. I have not measured it. I can say it is at least $2\frac{1}{2}$ feet above the bottom of the river.

Q. You say that the bottom of that headgate—the bottom of the Orphan headgate ditch is at least $2\frac{1}{2}$ feet above the bottom of the river at that point, do you?

A. I have not made any specific examination of that, but that is my recollection of it, from taking soundings there.

Q. Well, you said that it was as your best recollection?

A. As my best recollection, yes.

Q. From all the observations you have made?

A. Yes, from any observation I made there.

Q. At least $2\frac{1}{2}$ feet?

A. I think so.

Q. Along there, the bank of the river is higher than the country adjacent to it, isn't it?

A. Yes.

Q. It is built up a little bank on each side?

A. Yes.

Q. So that when there is any depression in the bank, or stock going over it that knocks it down, why, the water will run out when the river gets up—run out at these places?

(Testimony of W. A. Griffing.)

A. Yes.

Q. That is a fact, isn't it?

A. That is a fact.

Q. Do you know what the fall of the river is along about where this Orphan headgate is?

A. No.

Q. You observed it there—observed it carefully, I suppose, have you, to some extent?

A. Yes.

Q. Don't you know, as a matter of fact, that there is practically no fall there?

A. I don't know, because I haven't—how do I know?

Q. Well, looking at it, can't you tell that there is practically no fall from the north line of 34 down past the Orphan headgate, for quite a distance?

A. Well, the stream is sluggish.

Q. What do you say the average of the flow through the Orphan headgate is?

A. That is this season?

MR. TREADWELL: Yes.

A. From the measurements I have taken, the average has been between 16 and 17 second feet.

COURT: What is the capacity?

A. The capacity, as far as I have measured, about 27 or 28 second feet.

MR. TREADWELL: In the ditch, you mean?

A. Yes, in the ditch, the Orphan ditch.

Q. That is not the capacity of the ditch, however?

(Testimony of W. A. Griffing.)

A. No, that is not the capacity of the ditch.

Q. But it is all the water that has been taken out of the river into the ditch?

A. Yes.

Q. The highest flow you have had is 28 second feet?

A. Yes.

Q. You have a measuring gate in the headgate?

A. Yes.

Q. How deep does the water have to be there, in order to make 28 second feet?

A. The depth that that gate would register would depend upon the water that is coming across Section 27.

A. No, I speak of the water that is coming from the river.

A. Into the headgate?

Q. Yes.

A. The gauge would register eight-tenths with 27 second feet of water.

Q. Eight-tenths of a foot?

A. Providing there was no back water from Section 27. When the water is backed up into the ditch from Section 27, it will register about two feet.

Q. Depending upon how far it is backed up?

A. Yes, depending on how far the water is held up on Section 27.

Q. Does it make that much difference with the flow of the water through the headgate?

A. Difference in what way?

Q. Makes so much difference in the quantity of water going through on these measurements?

(Testimony of W. A. Griffing.)

A. There would be the same amount of water, but the gauge would register differently.

Q. You don't understand me, I guess. In order for 28 second feet of water to go through the Orphan headgate, what must be the depth of the water as it flows through the headgate?

A. About eight-tenths—six to eight-tenths of a foot.

Q. About eight-tenths of a foot?

A. Yes.

Q. Will give 28 second feet?

A. Yes.

Q. Provided, I gather from what you say, provided the ditch is free for the flow of that water?

A. That is right.

Q. But when the water comes over in Section 27, and flows down into the Orphan headgate ditch, that creates a back current which requires a depth of how much, you say?

A. Two feet.

Q. Two feet; in order to make 28 second feet coming through the ditch?

A. Yes.

A. That ditch is pretty near level along there, too, isn't it? Very slight fall; do you know what the fall is?

A. No, I do not.

Q. You didn't take any of those levels there at all?

A. No.

Q. And none of the men under your employment have taken any?

(Testimony of W. A. Griffing.)

A. Not this year, no; not that I know of. No, in fact I know they have not.

Q. The men that would make those measurements are under your employment?

A. Yes.

COURT: Does that same condition prevail at the headgate of the drain ditch, as to the territory being level, and the water flowing very sluggishly?

A. No, because conditions there are different than they are at the Orphan ditch. The water is pouring over the boards in the drain ditch, while at the Orphan ditch it is not.

COURT: I say, is the territory level, generally?

A. I think it is practically the same through there, yes.

Q. I want to ask you about this brush, up at 21 dam. You say there was one board in the dam across one of those openings?

A. Yes.

Q. Was that board nailed in there, do you know?

A. Not that I know of.

Q. It was at the bottom?

A. At the bottom, yes.

Q. How wide is that, do you know?

A. I don't know what the width of it is. I should judge about six-inch board—two by six. I think that is what those flash boards are.

Q. Now, what is the width of the opening? There are how many do you say—four?

(Testimony of W. A. Griffing.)

A. There are four openings.

Q. What is the width of the openings, do you know?

A. I don't know.

Q. You didn't measure them?

A. I did not.

Q. Give us your estimate.

A. Between three and a half and four feet. That is, roughly.

Q. This board was the width of one of those openings?

A. Yes, just the width of one of the openings.

Q. What about the brush that you say was there?

A. In what respect?

Q. Well, tell us about it. You answered yes and no to questions Mr. Treadwell asked you, but tell us about it now, what it was.

A. There was quite a quantity of brush holding that water.

Q. What do you mean by quite a quantity? Give us a little better idea than that.

A. I didn't count how many pieces, but there was enough of brush lodged against the dam to raise the water one foot; that is, the water was one foot higher above the dam, than it was immediately below, in a difference of three feet.

Q. Well, the general structure of that dam raises the water, don't it?

A. No. I have seen the water when it was running through there lately, when there were no obstructions,

((Testimony of W. A. Griffing.))

that there was no apparent raising in the water above and below.

Q. Did you measure the water above? Whereabouts below did you measure it below where it comes off the boards?

A. No, while they were still in the headgate.

Q. Measured the water in the headgate?

A. Yes.

Q. What was the difference in measurement between that and above, do you say?

A. One foot when the brush was in—nine-tenths of a foot to one foot.

Q. From nine-tenths of a foot to one foot?

A. Yes.

Q. How many times did you see the brush in there?

A. Oh, seven or eight times, if not more.

Q. When did you first see it?

A. In the first part of April.

Q. Early in April?

A. Yes.

Q. Was it all there then, just the same as it was at the last time, or did it accumulate?

A. Well, it was about the same then as it was up to the time it was taken out.

Q. When did you see it the last time?

A. After the middle of April. The exact date, I could not say off-hand.

Q. Well, you didn't take any memorandum? When did you take this photograph?

A. I think that photograph was taken April 8th,

(Testimony of W. A. Griffing.)

wasn't it? I wouldn't say for sure without looking at it.

Q. Was it after I came out there?

A. I took the photograph?

Q. No, that you saw it for the last time?

A. It was after you came out there.

MR. TREADWELL: April 8th this one was taken.

A. Yes, April 8th. That is as I remember it.

Q. Did you see it after I was down there? Do you remember that day I was down there? You were there, weren't you, down below on the ditch?

A. No, sir.

Q. Some of your men were?

A. Yes.

Q. You know when I was down there?

A. Yes.

Q. Was it after that?

A. That was on April 20th.

Q. Was it?

A. No, it was just before that.

Q. You got the date?

A. Yes.

Q. Was it after that you saw it the last time?

A. No, it was before that.

Q. How long before?

A. A day or so, I think.

Q. When did you go there and find that it was out?

Now, I was there on the 20th, you say? That is your memorandum your men made. And how soon after the

(Testimony of W. A. Griffing.)

20th was it that you saw it taken out, or rather, not saw it taken out, but that you saw that it was out?

A. It was around the 24th.

Q. Anyhow, the next time you went there it was out?

A. Yes, the next time I went there. I think it was the next time.

Q. What do you say about there being old broken, dead brush, some of it?

A. Some of it.

Q. What was the other?

A. Willows that apparently had the appearance of being cut; that is, showed the effects.

Q. How many of those willows were there that appeared to have been cut?

A. There were three good-sized limbs in there.

Q. They all seemed to have drifted down there, did they?

A. I don't know how they got there.

Q. No, of course you don't know how they got there. I appreciate that. But did they have the appearance as though they had been deliberately laid in there as a dam, or as if it had merely drifted down the stream?

A. Well, they were not laid in there symmetrically, no.

Q. Did you see any above there, or around there, where any willows had been cut?

A. I didn't look.

Q. You didn't look for that?

A. No.

(Testimony of W. A. Griffing.)

Q. You say apparently had been cut. Is that the way you put it?

A. They had the marks of a hatchet on them, where you would strike a limb diagonally, and cut it the way they are generally cut.

Q. But you didn't see any place where they had been cut?

A. I didn't see anybody cut them.

Q. No, nor you didn't see any place from which they had been taken?

A. No.

Q. Did it seem to be old, or was it new green ones?

A. New.

Q. New cut. Did you see the cut willows in there the first time when you saw the dead brush, or did they come there afterwards?

A. Well, I couldn't say whether they were there the first time, or not.

Q. Now, that would raise the water, you say, about a foot—from eight-tenths to a foot?

A. From nine-tenths to about a foot, yes.

Q. Was Mr. Hanley making any use of that water at all?

A. Yes.

Q. What use?

A. Going into his 21 ditch.

Q. Well, from there where?

A. Well a portion of it was being used on 22. Where the rest of it was being used, I don't know.

(Testimony of W. A. Griffing.)

Q. Was there a ditch on the west side that you noticed?

A. The west side of the river?

Q. Yes.

A. Yes.

Q. Was there any water going into that?

A. No.

Q. Isn't it a fact that that ditch on the west side of the river was stopped up by a dam?

A. Yes.

Q. Isn't it also a fact that if that dam had been taken out, and the level of the river reduced, this eight-tenths of an foot, or one foot, or whatever it is, that the water would have run into that ditch on that side, and he could have taken out a whole lot of water there? Isn't that a fact?

A. I didn't make any observations of that, but I believe it would have run into the ditch.

Q. So that if he had taken that out and taken all the brush out, and everything of that sort, there would have been more water going down through there than there was the way it was?

A. Down through where?

Q. Down through the west side and the east side, too; or rather, the west side.

A. Why, apparently, yes. There would be more water flowing on down the river."

* * * * *

"Q. Mr. Griffing, have you stated in your direct examination all the cases of diversion of water from both

(Testimony of W. A. Griffing.)

the east and the west forks of the river that you observed?

A. I believe so, yes.

Q. When did you first commence making your observations?

A. About the middle of March.

Q. The middle of March?

A. Yes.

Q. That was the first time you went out there?

A. That was the first time.

Q. You are not a resident of Harney County?

A. No.

Q. Where are you from?

A. San Francisco.

Q. They spoke of — somebody did — your having men working for you. Did you have any subordinates?

A. Yes.

Q. What were their duties?

A. Measuring water and running different lines, surveying.

Q. Surveying what?

A. Different fields and lands owned by the Pacific Live Stock Company.

Q. You were not engaged entirely, then, in making just these observations on Hanley's land?

A. No."

* * * * *

"Q. Now, you said in reference to this Luig dam in 31, that all of the west fork was going out except about four second feet, if I remember rightly?

(Testimony of W. A. Griffing.)

A. Yes.

Q. And it was going all over Section 6. I don't know whether you meant that to be just the loose, general language, or whether you meant it to be exact, that all of Section 6 was irrigated by that water.

A. No not all of Section 6, would have been irrigated by it, possibly. I didn't follow all the water down to see exactly where all the water was going.

Q. Do you know whether Section 31 was also being irrigated from it?

A. A portion of it, yes.

Q. How much?

A. Well, I couldn't say how many acres.

Q. Well, I meant approximately, by the subdivisions of the section, or did you investigate that?

A. Yes, there was a portion of the south half of Section 31.

Q. I will ask you this: Did you more particularly confine your accurate observations to the amount of water being diverted than to seeing where it went?

A. Yes, more particularly.

Q. Now, in relation to this new bridge, the stringers of which you say obstructed the flow of the river, what section was that in?

A. Section 27.

Q. And how far above the old bridge?

A. Not very far. I didn't make any measurement there, but it was a little ways above the old bridge.

Q. About what is the width of the river there? Where the bridge is?

(Testimony of W. A. Griffing.)

A. I should judge about 14 to 16 feet—14 feet to 16.

Q. And, as usual, the banks of the river are a little higher than the surrounding country, aren't they?

A. Yes.

Q. The country is pretty level?

A. Apparently.

Q. How much of the stringers were in the flow of the river?

A. All of them, all the stringers.

Q. Was the bridge itself covered?

A. No, some of the boards were floating.

Q. But it was passable as a bridge? The bridge itself as a bridge was not submerged?

A. No.

Q. What time of this year was that?

A. It was, I think, about the 8th—between the 1st and 8th of April.

COURT: Were those stringers in the new bridge set in lower than the stringers in the old bridge? That is, down into the stream?

A. They were submerged more, yes.

COURT: Well, I mean, taking a level?

A. Well, I don't know. I didn't take a level on it.

COURT: You didn't take a level?

A. No, but they were under the water, while the stringers in the old bridge were not entirely submerged.

COURT: Were they partially submerged?

(Testimony of W. A. Griffing.)

A. Partially submerged, the stringers in the old bridge.

Q. How much water was the new bridge throwing out over the bank of the river?

A. Well, it would have been impossible to take a measurement of it exactly. It was running out. It was running out in numerous small cuts or breaks.

Q. Just give your guess.

A. I couldn't make a guess.

Q. Did you observe where that water was going after it got out of the channel?

A. Yes.

Q. Where was it going?

A. It was going across Section 27, and from thence into the Orphan ditch.

Q. So finally, it got onto the company's property.

A. It went into the Orphan ditch, yes.

Q. Well, I don't know whether the court is familiar with the Orphan ditch. Do you mean it finally got onto the company's property?

A. I didn't follow it down after it left Section 3.

Q. Everything that gets into the Orphan ditch really gets on the company's property? That is what it is for, isn't it?

A. Yes, it is what the ditch is for."

* * * * *

"When did you first go to the Hanley ranch? That is the ranch of the William Hanley Company?

A. Along the latter part of March.

(Testimony of W. A. Griffing.)

Q. And you went there and asked leave to go on the property and make observations and measurements, didn't you?

A. Yes.

Q. What did you say was your purpose in making these observations and measurements?

A. Determining the duty of the flood water.

Q. To see how much water it required to water a particular area?

A. Yes.

Q. Wasn't that the statement you made?

A. Yes, that was it.

Q. You didn't make any statement about these particular points of observation?

A. No.

Q. Nor about your purpose to collect testimony?

A. No, I did not.

Q. But that was your intent?

A. Not at that time, it was not, no.

Q. When did it become your intent?

A. Some time the first part of April.

Q. And under instructions?

A. Yes.

Q. Under instructions from whom?

A. Mr. Treadwell—Mr. Gilchrist.

Q. Given orally or in writing?

A. Orally.

Q. Well, after you got those instructions, you naturally went on the Hanley property, to make these very observations, didn't you?

(Testimony of W. A. Griffing.)

A. Yes, at times.

Q. You were always welcome there, weren't you?

A. Yes, as far as I know.

Q. Now, did you at any time, say anything to Hanley or his superintendent, or anybody, about these difficulties and objections to the flow of the river, as you found them?

A. I told Mr. Hanley that I could not get accurate measurements so as to determine the amount of water necessary to irrigate a certain portion of land, owing to the fact that the water was running out of numerous cuts; that I could not get measurements of.

Q. Yes. What did he say?

A. I believe he said it would be rather hard to get accurate measurements.

Q. Well, what I am trying to get into the record, is whether you, as representing this company for whom you are working, went to Mr. Hanley and said: "Here are diversions of water, and here is wastage of water, and it ought to be stopped"?

A. No, I did not.

Q. And naturally you got no refusal from him? Now, about these cuts. You have called them cuts. What is your reason for believing that they are artificially made, or purposely made?

A. I believe I said they were either cuts or breaks, but there was evidence of shovel work in pretty nearly all of them.

Q. And you spoke about a lot of little ones. Did they all have shovel work?

(Testimony of W. A. Griffing.)

A. Not that you could notice.

Q. Which ones showed evidence of design — shovel work?

A. The largest ones.

Q. What?

A. Just the larger ones.

Q. I know, but I want to know how many there were, and where there were, that showed these.

A. The one on the east bank of the river, below the Hanley drain ditch, also the one on the left bank above the drain ditch, another one above the Orphan headgate, about in the northeast corner of Section 27, and the one below the Orphan headgate in Section 35.

Q. Well, just describe what you mean by the marks on the shovel. Were they excavations made and dirt carried from a distance?

A. No.

Q. Did you see those shovel marks at a distance, or see them in the cut itself?

A. Right at the banks of the cut, on each side of it.

Q. Did they seem recent?

A. Some of them, yes, had been recent.

Q. Now, the banks of this river, as has already been said, are higher than the surrounding country, and in the flood time, the river overflows its banks, and pours down onto the lower levels surrounding it, and as a matter of fact, this entire river bank is wavy, or indented with numerous depressions, isn't it?

A. Yes, to a certain extent, it is.

Q. So that, as the river gets up, it flows out over

(Testimony of W. A. Griffing.)

its banks, first in these various channels, or outlets in the bank, and they wear, don't they?

A. No, I don't think they would wear in the meadow sod. It requires a whole lot of current before it will wear.

Q. You didn't see anybody at work?

A. No, I never have seen anybody working there.

Q. Coming back to the brush in 21, dam in 21, I understand your answer is general, that you didn't call anybody's attention to any of these things, or make any complaint, but I would like to know specifically about that.

A. I didn't call anybody's attention to it at all, because I didn't know the conditions of the decree at that time.

Q. Well, I am just asking whether these people were warned? Now, the board which you speak of was just across one of the section openings, and that would really mean one-fourth of the dam?

A. Yes.

Q. On which side of the river, in relation to this board, was the set of the current, or the flow? Was it on the same side with the board or on the opposite side?

A. It was on the opposite side at that time.

Q. And this board, I thought the way that they finally got it into the record was a little bit obscure about dimensions, so I am going to state it as I understand it—this board would be about four feet in length, and six feet in perpendicular width.

A. No, about six inches.

(Testimony of W. A. Griffing.)

Q. Six inches, I should say, yes. That is right, is it?

A. Yes, that is approximately right."

* * * * *

REDIRECT EXAMINATION.

"Q. Now, did you mention those cuts to Mr. McLaren, the foreman of Mr. Hanley?

A. I did, yes.

Q. What did Mr. McLaren say those cuts were?

A. I was asking Mr. McLaren when I first went there, so as to get a line up, so as I could measure the water, and he said there were numerous cuts they used, he didn't say numerous—he said there were cuts in the bank of the river that formed part of their irrigation system that it would be hard to get any measurements of.

Q. When you went up there from San Francisco, you were employed, were you not, Mr. Griffing, for the purpose of collecting the necessary data to prove the duty of water, or the amount of water necessary to irrigate land in that valley, in adjudication proceedings?

A. Yes, sir.

Q. You were not given any instructions to get any evidence against Mr. Hanley, in regard to this decree in any way, were you?

A. No, sir, not in any way at all.

Q. It was not until later, when Mr. Gilchrist and I got on the ground, and found the conditions, that we asked you to get additional data?

A. Not until then.

(Testimony of W. A. Griffing.)

Q. But in the meantime, you had been measuring the entire river, in connection with the question of how the water was used, and where it was used, and therefore, how much it took to produce the results.

A. To produce the results, yes.

Q. So you had lots of this data before that time?

A. Yes.

Q. What you told Mr. Hanley was the absolute truth when you told him?

A. Absolutely, in every respect, yes.

Q. Now, Mr. Griffing, you have stated in your direct examination the time you forced all the water you could into the Orphan ditch, and got, I think about 27 second feet in there. How high was the river at that time at the Orphan ditch?

A. About—it was bank full, just at the top of the banks.

Q. So that was the full amount that could be taken into the head of that ditch, when the river was within its banks?

A. Yes, sir.

Q. There was one thing that might be a little obscure if it was not explained. You stated that at that time, when you got all the water into the Orphan ditch that you could get in, the water only stood on your gauge in the ditch, I believe, less than a foot in height?

A. Yes, about eight-tenths of a foot.

Q. Will you explain why that is, and how the ditch is constructed that causes that to that extent.

A. There is a grade to the floor of the headgate,

(Testimony of Edward F. Treadwell.)

evidently and it being narrow, it creates a very strong current, which lowers the water down; that is, providing there is no come-back water to less than a foot, about eight-tenths of a foot.

Q. And is there any overflow? That is, is there anything in the bottom of that gate that obstructs the flow at the flooring?

A. No, except the permanent board, that is in the front side, or the end of the headgate.

Q. That is what I want. So there is a permanent board in the front of the headgate?

A. Yes.

Q. So that the water from the river has to flow over that, and it is below that that you made this measurement?

A. Yes, it is below that that I made the measurement, yes.

MR. EDWARD F. TREADWELL,

One of the attorneys for the Pacific Live Stock Company, testified as follows:

DIRECT EXAMINATION:

Questions by Mr. Minor:

Mr. Treadwell, there was something said in Mr. Hanley's affidavit regarding the correspondence had between yourself and him, in regard to matters in Harney Valley.

(Testimony of Edward F. Treadwell.)

A. Yes, sir.

Q. Have you the original correspondence with you?

A. I haven't the original. I have copies of it.

Q. You have copies of it?

A. Yes, sir.

Q. I wish you would produce such copies as you have.

A. The first communication I had from Mr. Hanley was by memorandum that he left at my office—that is, he called at my office in the early part of March, when I was out, and I didn't see him, but he had a conversation with my secretary, and the secretary left me a memorandum of it, to the effect that Mr. Hanley wanted to suggest that if the Orphan ditch could be regulated with his bookkeeper, and our bookkeeper, who had just been sent into the country, rather than with the superintendent and foreman of our ranch, there would be no difficulty—they could get along nicely. I answered that by letter of March 4th, which read as follows: "Mr. W. B. Hanley, Burns, Oregon. Dear Mr. Hanley: I regret that I was absent from my office when you called, but I gather the general object was, owing to some uneasiness on your part in regard to the Orphan headgate. I certainly hope that that can be operated with due regards to your rights, and it seems to me that our representative in cooperation with your Mr. Sterling could do so without difficulty, and I am writing to the company to try and cooperate with you in every way so as to avoid any possible friction in this matter. I expect

(Testimony of Edward F. Treadwell.)

to be in Burns about April, and hope to see you at that time. Very truly yours, Edward F. Treadwell."

In reply I got this letter from Mr. Hanley:

"Burns, Oregon, March 20th, 1915.

Edward F. Treadwell, Esq.,

San Francisco.

Dear Mr. Treadwell:

I will not go into details regarding the Orphan head-gate, as you seem to catch the drift of my mind that this has been litigated enough, and know there is no reason why this should not be operated to the satisfaction of both our companies, with the understanding that this is the wish of the principals that it should be, and should your Mr. Terry and our Mr. Sterling meet there would be no question as to operating it satisfactorily. I will await your arrival in Burns.

Yours very truly,

Wm. Hanley."

That is the only correspondence I have had with Mr. Hanley, and he didn't leave any message, or I didn't get any message from him at the time in regard to any other matter, except the Orphan ditch.

Q. When did you go to Burns after that?

A. I reached Burns on the 11th of April.

Q. While you were in Burns, did you have any further conversation, or communication with Mr. Hanley, regarding these matters?

A. I did. Mr. Hanley requested that I go out with

(Testimony of Edward F. Treadwell.)

him, onto his property, and he said that the Orphan ditch and the embankment along the side of it, was preventing the water from flowing off his land, and he wanted me to go out there and see it. I think Judge Webster also said something of the same nature, and I finally made an engagement with him for the Sunday—it would be the 18th of April. I went with him onto the ranch. He took me personally, and we went down to his house, and from the house went down the bank of the river, along through Section 17. I might as well go ahead and state just what I saw, I suppose.

Q. State what you saw.

A. As I went down, I saw the river flowing through 27 within the general banks of the river all the way down; but there were quite a number of places that had either loose earth or places where you could see that control of the water had been put in—that is, stakes and boards, and things of that kind,—so that at the wish of the parties, the water could either be let in or kept out. And the water was all over Section 27, coming directly from the river, and as we got down to the lower end of it, it was quite a sea of water.

COURT: Was that during high water?

A. There was no high water at that time at all. The water was very low in the river. The water was somewhere from a foot, possibly, to a foot and a half deep, on parts of the property. Mr. Hanley took me right through it without any question of any kind—took me right down through the property, taking me down to the Orphan headgate, to show me how we were inter-

(Testimony of Edward F. Treadwell.)

fering with his rights. He took me down to the Orphan headgate, and when we got there we looked at it, and the Orphan headgate was closed, and was not taking any water whatever. We then stood there on the bank, and Mr. Hanley told me his idea: That his land had always been overflowed in 27, and that that overflowed down onto our 34—I think it is—and that we had no right to put any ditch or bank along there, to prevent that from being done. I simply told Mr. Hanley that the matter had been litigated, that the court held we had a perfect right to build that ditch; that we didn't intend to leave our land a marsh for all time to come; that it was a marsh, and we couldn't cut hay there or hardly raise hay there, in its natural condition; that we intended to reclaim it, and that we had reclaimed it by this ditch, and also by this levee, and that we intended to maintain it there. Then I went on and told him if he would prevent the water, as he should, from coming over on his land, he would have no difficulty whatever. Mr. Hanley and I then got into the wagon again and rode back across the field, and I told him that I didn't care to discuss the matter of the Orphan headgate further. That we built it for the purpose that I had mentioned, and we were going to use it. "But," I said, "Mr. Hanley, I do want to talk to you, about what you are doing with the water of the east fork of the river." I says: "Not only are we getting no water whatever, but the people at Lone Willows are getting no water whatever from the river. You are taking all the water on both sides of the river." I told him that his 21 ditch was taking water, that his

(Testimony of Edward F. Treadwell.)

drain ditch had taken water, and that the water was all over his land, and that we were getting no water whatever. I then went on further and not only complained of that, but said to Mr. Hanley: "Besides this, Mr. Corcoran, the superintendent of the Water Division, who is taking the testimony in this adjudication proceeding, is coming down here to go over all of the property in this valley, including yours, and" I says: "We are contending in this case that there is not sufficient water to irrigate our lands," as there certainly admittedly is not this year,—everybody, I believe, admitted that. There was no dispute about it. Now, I says: "For Mr. Corcoran to come down here, and find such a waste of water as there is on your property, certainly will be a very bad piece of evidence against the people of this valley who are trying to protect their rights in it." We talked that over, traveling clear across this section, and as we got about half way across, there was a wagon on the other side, and I said: "I wouldn't be surprised, Mr. Hanley, if that was Mr. Corcoran over there at the present time." In fact, Mr. Corcoran had told me that morning that he was going down over the valley. He didn't tell me that he was going to Mr. Hanley's, and I wasn't sure whether he intended that morning to go to Mr. Hanley's. But I said: "I wouldn't be surprised if that was Mr. Corcoran over there." Mr. Hanley says: "No, that is probably some duck shooters." The wagon was then approaching, and they had a gun, and they were approaching this immense lake which was covered with ducks, or mud hens—I don't know them apart myself hardly—

(Testimony of Edward F. Treadwell.)

and I am not sure which they were. I think that was the substance of the conversation that I had at that time with Mr. Hanley about this matter.

Q. Well, now, did you have any talk with him also in regard to the waters of the west fork?

A. Yes. Before I come to that, I might say that the next day, I think it was, I again saw Judge Webster. He was in town, and was acting for Mr. Hanley, and I told the same thing to Judge Webster. I told him that I didn't want to be bothered about the Orphan ditch—that that had nothing to do with the matter whatever—but that he was taking all the water of the river. And Judge Webster said: "Well, I haven't talked to Mr. Hanley about that feature of the matter at all, but I will report to Mr. Hanley what you say." The next week Mr. Hanley called me up, toward the end of the week—I guess it was on Saturday—and said that he wished to see me; not about anything in connection with the water whatever, but in connection with another matter entirely, that I don't know as it would do any good to go into at this time. I told him that I understood that he had an engagement to meet Mr. Corcoran at the Island Ranch on Sunday morning, and as I was going to be there, it would be satisfactory to me to meet him at the Island Ranch, and talk that particular matter over. He came there, and talked it over Sunday morning. This was Sunday morning—the 24th would that be, of April—I get these dates mixed; the 25th—the 25th of April. We talked over the matter that he came to talk about, and after we had exhausted that matter, I said:

(Testimony of Edward F. Treadwell.)

"Now, Mr. Hanley, there is something much more important than that." I says: "I have already told you of what you have been doing with the whole of the east fork of Silvies River. Now" I says, "I was very much surprised yesterday to find that you are doing the same thing with the west fork." I says: "I went down the west fork yesterday." I had gone down the day before, Saturday, in going to the Island Ranch, in company with Mr. Corcoran, had gone down the west fork of the river.

COURT: Whose ranch is the Island Ranch?

A. That is what we call the Company's ranch. It is just a name. I told Mr. Hanley, I says: "I went down there yesterday, to the west fork, and I found the dam at the Young place, and the ditches taking water." I says: "I went down to the Luig dam, and I found the Luig dam in the river, and taking all the water practically of the river. And I saw also the People's ditch, open and taking water unobstructed from the river. And I says: "Mr. Hanley, if you have nothing to do with those things, I want to know that. On the other hand, if you have anything to do with them, I want to know that, so that I can proceed accordingly." Mr. Hanley says: "Mr. Treadwell, you can take it from me that I have all to do with those matters." I then said to Mr. Hanley—

COURT: Did you understand by that that he had all to do with the matters on the west fork?

A. On the west fork, the three matters that I mentioned to him, with the dam at the Young place, the Luig dam, and the People's ditch so-called—those three mat-

(Testimony of Edward F. Treadwell.)

ters—and he said: “I have all to do with them.” I was not satisfied with that, so I said to Mr. Hanley, something as to the Young dam and ditch, because I was not sure whether he understood it or not, and he says: “Yes, I am the one that is using that.” He says: “I have a tenant”—my recollection is he said on Section—is it 19 or 29? 29—on Section 29, as I understand it. I don’t think it was 19. That would be immediately above it. I don’t know as that is Mr. Hanley’s land at all. At any rate, my idea is he said 29—“He has some grain, and I told him that he could use the dam and ditch to get the water.” I said: “Mr. Hanley, your land in 29 is on the east side of that fork of the river,” and I said: “I don’t know whether the water has gone there, because I was not on that side of the river. But the water is also going the other way to the west.” I says: “The water is going to the west side, also, and it is going through the ditch on that side of the river.” I don’t remember what further Mr. Hanley said, in regard to that matter, what explanation he made of it, whether he said that he didn’t know whether it was going in that direction or not. Really, at that point, our conversation broke up, and that was about all there was to it.”

* * * * *

“Q. Now, Mr. Treadwell, what was the condition of the water in the river during that time? I mean of the flood.

A. Why, there was no flood whatever in the west fork at all. The water was well within the banks. On

(Testimony of Edward F. Treadwell.)

Mr. Hanley's land, the channel is fairly good through Section 27. It gets very bad in Sections 34 and 35, as has been testified to here. But it is a sodded bank all the way along, and except in these low places, whether they are cut or what they are I don't know, the river was well within its banks, but close to the top of the bank; possibly an average of six inches below the bank, and some places less than that.

CROSS EXAMINATION.

Questions by Mr. Wood:

Mr. Treadwell, when was it that you first made this journey down the river, with Hanley, did I understand, by date, you can fix that. I think one meeting was Sunday, April 25th.

A. The first meeting was Sunday, April 18th.

Q. Just a week before?

A. Yes.

Q. Who were present—just you and he?

A. Just Mr. Hanley and myself, on the trip. I think the only other person we saw when we came back to the office, we saw Mr. Sterling the bookkeeper. We were alone on the trip.

Q. Did you see these cuts, with the shovel marks, the spade marks?

A. Not so I could testify to them that way, Mr. Wood. We didn't get out at any of them. The ones I noticed were not so much spade marks—I wouldn't be able to get close enough for that. The artificial effect

(Testimony of Edward F. Treadwell.)

of stakes and things of that kind I could see; but I could hardly testify that I was close enough to see any actual spade marks.

Q. Are you familiar enough with the banks there that in reference to say the 21 dam, or the Hanley house, or the bridge just at the house—starting from any point—that you could locate those places that seemed to have stakes and apparatus for diverting the water?

A. I don't think I could, Mr. Wood. I don't remember whether any of these photos are the same ones that I saw, or not.

Q. Well, how many of these places apparently arranged for water diversion, did you notice?

A. Either one or two with the stake affairs in them on that side. I wasn't across on the east side at all, you understand. I was only on the west side.

Q. Do you mean the West Fork?

A. No, the west side of the East Fork. I was only on one side, and I think probably these pictures are taken on the other side, so I didn't see those.

Q. Would you say they were in Section 27?

A. As I understand it, Mr. Hanley's house is near—it is not marked on this map.

Q. It is not very far below the 21 dam.

A. That is what I thought. I should say, then, that part of the things that I saw were on 21 as well as 27. But I would not undertake to locate them. But the water was undoubtedly coming out of the river partially on 21, where we went, as well as 27.

(Testimony of Edward F. Treadwell.)

Q. For our information, can you describe a little more in detail how these things were built?

A. One of them was built very much like this photograph that was here.

Q. And how permanent were they?

A. If I remember rightly, one of them that I saw—

Q. Will you just designate into the record, when you find it, the description of the photograph.

A. Most of them were smaller than these that have been described on the other side of the river by Mr. Griffing.

Q. You mean the other bank of the same river, the same fork?

A. Yes. This photograph, Exhibit 15, shows somewhat the manner of construction except the one that I saw was not nearly in place like that—it was practically all out, all open—but showed the same character of construction, but in much smaller manner; that is, unless that photograph is exaggerated, which I don't know, of course.

COURT: What is the number of that photograph?

A. Fifteen. But it showed stakes driven into the ground on both sides, where material could be easily placed to control it. That is the best I can describe it. We went down, trotted right along, and were talking all the way. While we were pretty close to the bank, we didn't stop at any of them. In fact, I said to Judge Webster, in addition to what I have said—I told him that I felt a little reluctance about this matter of taking

(Testimony of Edward F. Treadwell.)

any proceeding on that matter at that time, on account of the fact that I was Mr. Hanley's guest when I was down there; and it was not until these other matters came up on the other fork, that could not be overlooked, that this proceeding was brought.

Q. Well, you said that you understood Mr. Hanley to say that he assumed all responsibility for the Luig dam, the Young dam, and the People's ditch. You could not come reasonably near giving the conversation.

A. I could give you his exact language, and every word and letter of it on that subject.

Q. All right.

A. He says: "You can take it from me, Mr. Treadwell"—we were rising then to depart—he says: "You can take it from me, Mr. Treadwell, that I have all to do with it." That was his language.

Q. Well, the point with me is—now, we claim that he had all to do with the Luig dam; we exonerate Luig, and we admit that Hanley had all to do with that; but we still claim, as stated in his affidavit, that he had no more to do with the People's ditch than you did, and no more to do, while he claims ownership of the Young dam, that he had no more to do with its use than you did—and my point is to see whether you can definitely fix his assuming the responsibility as relating to the People's ditch and the Young dam, as well as the Luig dam.

A. I can, Mr. Wood, positively, that I mentioned to him the three things. I says: "I found the Young dam and ditch taking water. I found the People's ditch

(Testimony of Edward F. Treadwell.)

wide open, and I found the Luig dam taking all the water of the river; and I want to know—if you have nothing to do with those things, I want to know that; and if you, on the other hand, have got something to do with it, I want to know that.” And he says: “I have all to do with it.” And then we took up specifically the Young proposition, and he told me who, he understood, was using it, namely, his tenant, and that he had told him that he could go there and use it.”

* * * * *

“A. Mr. Hanley also mentioned a further conversation that I had with him, that I neglected to reply to. On the following Monday, Mr. Hanley returned to Burns, after I had seen him. He stopped his automobile on the street, and he said: “Mr. Treadwell, I will look into that situation on the west fork.” I said: “Mr. Hanley, you will find no situation when you go there.” That was my exact language to him, meaning by that, I had already directed our people to restore that river channel, in the condition we were entitled to have it.”

* * * * *

Referring to the diversion of water from the Young dam on the 24th and 25th of April, the witness testified as follows:

“Q. Was any going in the ditch leading out on the east side?

A. On the 24th, I am not sure. On the 25th Mr. Young took us to that side and there was no water. There was a little dampness in the bottom, but it would

(Testimony of John Gilcrest.)

not be at all clear that it was by diversion. It might be simply by seepage. There was no water on the east side. It was going to the west.

MR. JOHN GILCREST

The superintendent of the Pacific Live Stock Company, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Treadwell:

During the months of March and April, Mr. Gilcrest, where is the chief body of the land of the Pacific Live Stock Company, that is irrigated by the waters of the East and West Fork of Silvies River?

A. At what we call the Island Ranch.

Q. How far, in a general way, is the bulk of that land situated below the Hanley land and the Luig land where these various structures have been?

A. Practically joins their lands on the south—joins Mr. Hanley's lands.

Q. I mean where is the main body of the hay land, the big body of the hay land that the company irrigates?

A. As to distance from their land?

Q. Yes.

A. The main body is probably ten miles—eight to ten miles.

Q. That is the main body of land that is irrigated with the water, while it is in flood in March and April, is it?

(Testimony of John Gilcrest.)

A. It is.

Q. And the mere fact that some of this water that was diverted comes off on these tracts that adjoin the Hanley land, that does not help your land down there?

A. No.

MR. WOOD: You are leading.

MR. TREADWELL: Oh, yes, but we will get to that.

Q. Will you state to the Court what has been the condition of the water on our land this year, and the water of the river generally?

A. The main body of our hay land, we have practically had no water as yet. None with which to make a crop.

Q. What has been the condition of the river this year with reference to your knowledge of it, during the years you have known it?

A. It has been the lowest, generally, since the snow began melting. It has been the lowest I have seen it in 25 years.

Q. What is the general condition of snow in the mountains now?

A. Practically gone.

Q. So that, is the flood period past, or in the future, now, for this year?

A. The flood period for this year is past.

Q. And from your knowledge of the conditions, is it possible for you to make a crop of hay on your property unless you get the water during this flood period in March and April?

(Testimony of John Gilcrest.)

A. We cannot make a crop of hay.

Q. If, in the times permitted by this decree, now, that is, from the 1st to the 12th, these upper people put in their dams as required by the decree, will you get any material amount of water at all, out of the lower end?

A. We can grow less. Even the small amount we have now will be shut off.

Q. Do you know one of the principal dams of the company, on the east fork known as the Mace dam, down below the Hanley place?

A. Yes.

Q. About how far below the Hanley place is that?

A. He owns property down within a quarter of a mile of that.

Q. I mean how far below these points that have been covered by the testimony?

A. Less than a mile.

Q. Have you had any water down there?

A. Not up to the present time.

Q. Will you explain to the court, Mr. Gilcrest—

A. Excuse me a moment. I said not up to the present time. The last time I came by, there was water coming from the Mace dam.

Q. How much?

A. A small quantity. I didn't measure it. I don't know as it was measured.

Q. This water that is diverted by Hanley over to the east, does that come back to the river above your Mace dam?

A. It does not.

(Testimony of John Gilcrest.)

Q. That water that goes through the drain ditch, where does that go to?

A. It flows in the Embree slough and eventually into the East Fork of the river again, at or near what is known as the Embree Bridge; the road from the Hanley ranch crosses.

Q. That is below points of diversion?

A. Yes, below all the points of diversion.

Q. You have some lands, though, below that?

A. We have lands below that.

Q. Do you know whether the water that is diverted out into the Hanley drain ditch goes onto any of the Hanley land in that vicinity, or not? Have you gone over that, or not?

A. I have not; not this season.

Q. Will you explain to the court the condition of the river channel in the vicinity of Section 34 and 35, and your object and purpose in constructing that Orphan ditch?

A. Our object and purpose was to keep the flood water and the water diverted by Mr. Hanley onto his Section 27, from submerging our Section 34, making it as it used to be, tule and flag, principally. The ditch was first constructed, a small ditch, by Mr. Clemens, I think, Mr. Smith, Mr. Porter, Mr. Peary—

Q. That was before you purchased the property?

A. Yes, sir, before we purchased the property.

Q. Has the construction of that ditch reclaimed that land, so you now can cut hay, principally?

(Testimony of John Gilcrest.)

A. It has. It is one of the best hay sections we have at present.

Q. Will you state to the court what the condition of the channel is down there between 34 and 35.

A. The river channel comes into the company's land in Section 34, the northeast corner of the northeast quarter, makes a short turn into that section, then goes back onto Section 35, the land of Mr. Hanley, runs down through that, traversing the west half of the west half of the northwest quarter of Section 35. Then somewhere near the quarter section corner on the line between 34 and 35, it turns back into Section 34, this company's land.

Q. What is the character of the channel through there?

A. The character of the channel immediately below the head of the Orphan ditch, where it traverses Mr. Hanley's land, through 35 back to 34, is very narrow, and very much choked up, grown up with tule, floating matter, dead animals lodged in it. Any floating material down the stream lodges in there against the tules, and it is very much choked up. From where it enters Section 34, it was exactly in the same condition as I speak of in former years, and I had it opened up to give it free vent. It has been said that there is no fall there. Since that channel was opened up through our part, through where it goes into 34, and passes out of 34 into 3, it has a very good current, carries the water.

Q. You have offered to Mr. Hanley to build a

(Testimony of John Gilcrest.)

channel for the river between those two sections that would have a good channel through there, have you?

A. I have.

Q. Have you actually constructed your half of it along your line?

A. I have.

Q. Is it there now?

A. It is there now. From where the river comes back into our Section 34. I have constructed a channel, opened up an old channel.

Q. Did he agree to do that?

A. He did not. It was once agreed upon, some 20 years ago, by his brother and myself, but it was never done. Since then, he has refused to do it.

Q. So Mr. Hanley has refused to put a channel there, that would reclaim his land, and reclaim your land?

A. He has refused to open that channel up.

Q. And the one that you have put in a sort of ditch along your line there, is that what you refer to, or do you refer to the channel itself?

A. I refer to the channel that I constructed. What is known as a ditch along our line on the east side of the northeast quarter of 34, was the ditch—is the borrow pit from which we took material to levee the line, to prevent flooding our land when he was letting all the water go over and flood over the country. It would submerge 34 from there just the same.

Q. So you don't use that as a channel or irrigating ditch?

(Testimony of John Gilcrest.)

A. We do not. That was constructed solely for a levee to prevent the overflow from his land coming back onto ours.

Q. If Mr. Hanley would construct the same on his line, then the two of them together would make a river channel and protect both places, would it not?

A. It would.

Q. That is what he has refused to do? Is that not so?

A. Yes, sir.

Q. You went and saw this 21 dam, did you, in the condition Mr. Griffing has testified to when it had the one board in, and the brush?

A. I did.

Q. When did you see it in that condition?

A. That was on the 25th of April."

* * * * *

"Q. Every year, do you go up the river to see whether any of the dams are in at times they shouldn't be permitted by the decree?

A. I do every year.

Q. Have you ever known the Luig dam to be used at any time except when it was permitted by the decree?

A. Never except in the fall of the year, when they carelessly leave the boards, and the manure and the hay in it, and the river is very low. I have noticed a number of times then, the brush and stuff, and have complained about it, and notified Mr. Luig through his attorney.

(Testimony of John Gilcrest.)

Q. But it has never been used for irrigating prior to the time that the decree permits it to be used?

A. Never to my knowledge—until this year.

CROSS EXAMINATION.

Questions by Mr. Wood.

When was this agreement made between you and Ed Hanley and William Hanley to open up the old channel of the river, through the tule marshes in 34 and 35?

A. Some 20 years ago, between Ed Hanley and myself.

Q. Why didn't you do it right away then?

A. Through press of other matters at that time.

Q. When was it brought up then, with William Hanley?

A. After he came over into the country and took charge of their property.

Q. How long ago is that?

A. Just how many years ago, I don't know, but it was a good many years ago.

Q. Is that the time that he refused?

A. I think the only time that I talked the matter over with him personally, that he refused.

Q. And that was a great many years ago?

A. A good many years ago.

Q. Now, your object of the Orphan headgate—the ditch leading out of it—the opening up of the river channel in 34, and the dike is this, as I understand it, that naturally and originally, 34 was flag and tule marsh,

(Testimony of John Gilcrest.)

and that that was made by the spring flood getting out over the banks of the river, and coming down onto that section, and settling there on low land; and a good deal of it came down over Section 29; and that if you can dike that water off from getting onto your land, and then drain your land, you reclaim it and make it as it now is, a good hay section? Is that it?

A. If we can keep the flood water from it, from standing on it.

Q. Yes.

A. That is a basin—the lowest depression in that whole territory—34 and 35.

Q. Now, if you bank up, or dike up this water that comes down over Hanley's Section 29, and don't provide for carrying it off,—

MR. MINOR: Do you mean 29?

Q. 27, I should say; and I think I said 29 before. That should have been 27. If you bank that water up, and prevent it coming on 34, you do reclaim your swamp on that land, but unless you provide a means of rapidly carrying it off, you also bank it up on Hanley's 27, don't you?

A. We built a ditch that we supposed—and I think it does; this is the first year that levee has been built, since the water—it was built last fall, the levee was completed—we think that the ditch will carry the water that comes off from his 27, and take it entirely away.

Q. I think you were in court and heard Mr. Griffing testify that the Orphan ditch would only carry about, I think he said, 12 cubic feet; but whatever he said, he

(Testimony of John Gilcrest.)

did say that that ditch would fill up when the river was normally full, and it would then be full to its carrying capacity from the river; and naturally, you cannot put a quart into a pint cup, and any more water coming down over 27 would have no place to go—the ditch would be full—so it would have to bank up on Hanley, wouldn't it?

A. We wouldn't use it from the Orphan headgate, don't propose to use it from the Orphan headgate; when there is sufficient water coming off 27 to fill the ditch.

Q. I want to avoid putting you back on the stand, in rebuttal, for anything that we can anticipate now. You know Hanley, in his affidavit, says that you are backing the water up on him today, to the injury of about a quarter section of land. What have you got to say about that?

A. We were not backing the water up on him, when I saw it. It is a mistake.

Q. Would it be possible, in your opinion, for your reclamation system of 34, to throw the water back onto Hanley?

A. If he continues in diverting the water, both from his dam and those openings in the river bank, in excess of any earthly necessity, he can put out water enough there that we cannot carry in that ditch, and it would back it up—no question about that. It would—that levee on the south side of the ditch, the lower bank of the ditch.

Q. Well, now, Section 27 from time immemorial

(Testimony of John Gilcrest.)

has been naturally flooded, hasn't it; without any operation of Hanley's? It was flooded in the Indian country, wasn't it?

A. I was not there.

Q. Well, from what you would see of the situation, wouldn't you say that? I was, but I couldn't testify on that point.

A. The lower part of it has, in former years, been naturally flooded from the choked up condition of the channel through 34 and 35.

COURT: How does that Orphan ditch carry off the surplus water?

A. It runs along his south line of 27, our north line of 34. There is no bank on this ditch, on the upper side. The flood water and excess water off his 27 flows uninterrupted into this ditch. On the south bank of it, the lower bank of it, we have built a large levee clear across and carry that water onto the west, onto our lands further west, and prevent its overflow. In former years, since that ditch was built, such an excess of water came across 27 that it obliterated our ditch bank, and no matter what we turned out at the Orphan headgate, it made no current. The cross current off 27 was so much greater that the water coming out of the Orphan headgate simply mingled with it, when it struck it, and went on south, across 34, and submerged it.

COURT: Was it your intention by that Orphan ditch to carry the surplus water to the west and thence down below?

(Testimony of John Gilcrest.)

A. Yes, sir, to our lands adjoining 34—33 and Section 4.

COURT: Was that sufficient to carry off the flood waters, except in cases where there was a great deal of water?

A. From the river itself?

COURT: No, that came over off Section 27?

A. I thought it was sufficient—would be sufficient to carry the excess water coming off 27 further out where we needed it. We didn't want it on 34—it ruined it. It submerged it and grew nothing but tule, and there was no way of getting it off—tule and flag.

COURT: Was the condition of the land to the west at the end of the ditch low enough so that the water would naturally run that way after digging your ditch?

A. Yes.

MR. TREADWELL: I want to call your attention to an error you made. You said Mr. Griffing said it would only carry 12 feet. What he said was it would carry 27 feet at the head; lower down it took 90 feet.

MR. WOOD: His record would show. I didn't pretend to have the memory of it.

MR. TREADWELL: It is only an error.

Q. Mr. Gilchrist, as a matter of fact, you get, as it were, a double benefit from keeping the water off the marsh pool, or basin of 34, because in keeping it off that, you carry it on to other lands you own, and get it for irrigation purposes? So you both reclaim a marsh, and irrigate your lands, don't you?

(Testimony of John Gilcrest.)

A. We claim that we are entitled to that water below for lands below that need it much worse. We could irrigate 34, and the lands to the west of that from the Orphan headgate.

Q. That doesn't quite answer my question. I will put it briefly. You get a benefit on other lands that you own, from the water that you conduct away from Hanley's 27 and your 34, don't you?

A. We do get a benefit from it in that way.

Q. Now, the Judge asked you about the Orphan headgate. As a matter of fact, its origin was a simple diversion of stock water, wasn't it?

A. I think that was its origin, yes, sir.

Q. Who were the men you say put it in?

A. Porter, Clemens —

Q. Smith?

A. Not at that time. I don't think Smith had any interest in it at that time. He may have had, but I don't think he had.

COURT: Mr. Clemens had a ranch down there, didn't he?

A. Yes, he owned 33 at that time, and the north half of four.

COURT: Was his ranch also irrigated by flood waters at any time?

A. Yes, sir, flood waters from above him, and from a slough from the east bank that came in, about the northwest corner of Section 33. The flood water came from there.

Q. This headgate, this ditch and headgate, that was

(Testimony of John Gilcrest.)

put in to carry stock water out, by these men, is not the same structure as now?

A. It was not.

Q. In fact, in the former proceeding, your company disclaimed any interest in that stock water ditch, and that is the way it got the name of the Orphan, wasn't it?

A. No, I think we never disclaimed any interest in the ditch, because when it was first built, it was for stock water, and we got stock water from it, in the same way that Clemens did. It passed through his Section 33, north half of 4, and into——

Q. What was it you did disclaim?

A. We disclaimed that they could use it at any and all times, as they eventually tried to do.

Q. You disclaimed any responsibility for keeping up the headgate, or keeping it in repair, didn't you?

A. We did, because at that time, they were to keep it in repair. That was the understanding.

Q. So afterwards you bought their property?

A. We did.

Q. So now, you are successor to their rights?

A. We are."

* * * * *

"Q. Now, Mr. Treadwell asked you if you made an inspection of the river when the flood season came on, to see that the dams and things were open. Do you make that inspection personally?

A. Personally.

Q. Every year?

(Testimony of John Gilcrest.)

A. Every year.

Q. And how often?

A. Several times.

Q. Several times during the irrigating season?

A. Prior to the dates that they are permitted to put in their boards.

Q. You are handling a good deal of property. You are handling, as manager, all of the company's Oregon property, aren't you?

A. I am.

Q. You are away a good deal. It covers a good of territory, doesn't it?

A. A good deal of territory.

Q. What I am trying to get at is, would it be possible that these dams could have been there and you not know it, in former times?

A. Yes, they might be in times that I am absent. But it is a very important matter,—nothing more so—in the spring to get that flood water, and I always make it a point to be there at those times, and look into it myself.

Q. Now, you say this is the lowest that the river has been in your recollection, I think you said?

A. I did.

Q. Still there has been a flood, hasn't there? That is, there has been an increase in volume?

A. There has been an increase.

Q. With the melting snows, and the spring rains?

A. Yes. There has been no flood.

Q. What would you designate a flood?

A. When the river goes out of its banks at points.

(Testimony of John Gilcrest.)

Q. Wasn't the river out of its banks at all this year?

A. At no point that I saw was it out of its banks.

Q. Well, I understood both the young engineer here, Mr. Griffing, and Mr. Treadwell to say that at times early in April, I think they put it,—it might possibly have been March—the river was so nearly bank full, that it was running out from the depressions and low places in the bank?

A. That is true.

Q. You wouldn't call that a flood?

A. I would not. Those depressions, or cuts, or openings, were not as the bank was originally. The sod was broken. There were openings there. The water could go out when it was not nearly bank full.

Q. You mean by flood, that the whole river gets out over the bank its entire length?

A. No, I don't.

Q. Spreads out over the country?

A. No, no. When it goes out of its banks naturally, at points that it has in former years, and it is specified in the decree in several places as to some parties defendant in the decree, that they were entitled to the water that got out of the banks naturally at flood times, before they had the right to put their boards in.

Q. Well, then, the river always, even in what you call flood time, has some part of its banks out of water, and it gets its relief through what you might call safety valves, natural depressions in the bank?

A. It does."

(Testimony of John Gilcrest.)

“Q. Mr. Gilchrist, in putting in this Orphan head-gate and ditch, was the main purpose to reclaim 34 or to carry out irrigation water to three and four?

A. Both.

Q. You could not say which was the most important?

A. No, about equal.”

* * * * *

“Q. Mr. Gilchrist, I talked with Mr. Hanley at lunch about your statement that he refused to, cooperate with you in opening up the channel of the river, and I will be frank to say he does not recall it. Could you be more specific about the conversation, when and where it was, to refresh his memory?

A. No, I cannot; but we discussed it numerous times. I think I was mistaken this morning in saying that he never had agreed after his brother Ed Hanley had left the country, practically given up the handling of the property, that he never had agreed with us in opening that river channel down through there between 34 and 35. I am sure that I was mistaken, because I think one time Mr. Hanley and Mr. Kenyon, Mr. Minor and I think, yes, Mr. Johnson, Civil Engineer up there, we were all, I think, at the same time right there at the corner of 34 and 35, right at the northeast corner, and we discussed the matter, and he said then that he was willing to join us in making it.

Q. About when was that?

A. Oh, I can't remember the year. I don't recollect the year, I remember the circumstance.

(Testimony of Ben Newman.)

Q. Could you say, however, about how long ago, eight years, ten years?

A. I should say fully eight years ago, or more; eight years ago anyway."

MR. BEN NEWMAN,

Foreman of the complainant's Island Ranch, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Treadwell:

"Will you state to the Court when you first noticed Mr. Hanley taking water from the river through the drain ditch this year?

A. Well, all through March, and up until about the 8th of April, it was going out through there.

Q. Will you state what, if any, effect that had early in the year, even, on your stock water?

A. Why, I went up there in March, two different times, and put in two boards clear across this channel, to try to get some water down to the Orphan headgate, where I had some cattle out in Section 4. I could not get any water there, so I had to finally put in a gasoline engine and pump water there for the cattle.

Q. You mean you tried to shut up the drain ditch so as to force water, down the river—to force water down the river, where you could take it out for cattle?

A. Yes. But the headgate at the drain ditch was in

(Testimony of Ben Newman.)

very bad condition. It had a lot of hay and such stuff, and float in it.

Q. During this season do you know the dam of the company known as the Mace dam?

A. Yes, sir.

Q. What, if any, water have you had down there, Mr. Newman?

A. We haven't had a great deal there until about the 20th of April.

Q. Is it the custom of the company to take water at that point?

A. Yes, sir.

Q. What land is irrigated by that?

A. What we call the Mace field, and the Turrell field there.

COURT: Can you describe those by the sectional subdivisions?

A. Section 2, I guess the Mace field is.

Q. The dam that you refer to as the Mace place is the one that is marked here as the H. B. Mace dam in Section 2, is it?

A. Yes.

Q. That is the company's dam?

A. Yes, sir.

Q. Where is the land of the company that is particularly irrigated by that?

A. Right south of the dam, in what is known as the Turrell field. I guess it would be in—it would be part of these two, I think,—the south half of it.

(Testimony of Ben Newman.)

Q. That is, the ones that have the circles around are the company's land?

A. I don't know just what section that is in. We call it the Turrell field.

COURT: What is the section?

A. 12 and 11.

Q. So it would be 11, 12 and 2, would it?

A. Yes.

Q. In the big Island field itself, down below the house, the big hay field, will you state to the court what the condition of that has been this year.

A. There is practically no water on it. It is dry, you might say.

Q. During the time that you have been on this ranch, is it part of your duty to examine the river to see whether the dams are kept up during the period that the decree provides the river shall be open?

A. Yes, it is.

Q. Do you go up and down the river every year for that purpose?

A. Yes, sir, very often.

Q. Prior to this year, have you ever known the Luig dam, or that old skeleton of the Voegtly dam, to be maintained in the river, prior to the time allowed by the decree?

A. No, sir.

(Testimony of Ben Newman.)

CROSS EXAMINATION.

Questions by Mr. Wood:

Mr. Newman, when was it you saw this drain ditch of Hanley's full of water?

A. Well, it was pretty nearly all through March and up until about the 7th day of April.

Q. Did you make frequent visits?

A. I went up there once or twice every week.

Q. I will ask you, in all your testimony now, to just state what you yourself know.

A. Yes.

Q. You say that in that interval from the first of March to the 6th of April, you were up numerous times?

A. Yes, sir.

Q. Was it always full of water?

A. It always had about the same amount, excepting some nights it would be a little cold, perhaps, it would be up and down, as it usually is there at that point.

Q. Well, now, isn't that a good headgate constructed just in the same character as one of the dams in the river—good substantial?

A. No, sir, it is not a good headgate.

Q. Suitable structure, isn't it?

A. It was at one time, but it is pretty well rotted away.

Q. That is, the structure of it?

A. It was at one time.

(Testimony of Ben Newman.)

Q. I say, that is the character of the structure, that is the way it was built?

A. Yes.

Q. Where is it rotten?

A. Well, on the sides of it.

Q. What is the effect of the rot?

A. Well, it is just like any other rot, of timber and water.

Q. Well, I know, but how does it affect the efficiency of the headgate?

A. Well, naturally, water will seep through places like that, you know, from the wings and go around it on either side of it.

Q. Did you notice that there was much flow of water in the drain ditch?

A. Yes.

Q. Was it moving pretty rapidly?

A. There was during the month of March, and up until the first part of April.

Q. What was the state of the river at that same time?

A. Well, the river down at the northwest—north of the Orphan headgate, was very low there at that time.

Q. How was it up by the Hanley drain ditch head?

A. There was considerable water in there, but this drain ditch is lower than the channel of the river is; when the boards are taken out of that, it practically takes all the water that is in the river there.

(Testimony of Ben Newman.)

Q. So that I understand that the boards were out during all these times that you were up there?

A. Yes, sir, I think until about the 7th or 8th of April, some one put them in and also hauled some hay and stuff and put around it.

Q. No flood water at this time?

A. Well, not to speak of, like usually.

Q. When was it you attempted to replace the boards yourself?

A. I don't remember just exactly the date. It was in March.

Q. I don't expect you always to remember the date, unless you made a note of it, but you might remember possibly whether it was the early, middle, or late March.

A. Well, it was about the middle of March, and also the latter end of March.

Q. Just state a little exactly, what you did, will you?

A. I put two boards in the dam, that was laying out on the bank, to try to force more water down the natural river channel.

Q. Did you do anything else?

A. No, sir, nothing whatever.

MR. TREADWELL: The dam—you mean the headgate?

A. The headgate, yes.

Q. We are talking now about the drain ditch headgate; that is what you understand?

A. Yes.

(Testimony of Ben Newman.)

Q. What effect did these boards have?

A. They naturally would turn more water down the river channel.

Q. Did that complete the entire dam, or headgate? Did that make it fully up, or were there more boards?

A. No, there were some more boards there.

Q. Why didn't you put more boards in?

A. Well, I didn't think it was necessary. In fact, there was water running around each wing at that time, and I didn't think it would hold any of it.

Q. How much water?

A. Well, not a great deal, but as you would raise it—put more boards in, it would have more pressure on it, of course. It would force it around that much worse.

Q. Well, you fixed it to your own satisfaction, as far as you were then concerned?

A. I didn't do anything, only put in two boards.

Q. Did you complain to Mr. Hanley, or Mr. Sterling, or anybody about the rotten condition?

A. No, sir.

Q. Or call their attention to any of the difficulties that you were having?

A. No, sir.

Q. You didn't say anything to anybody?

A. No.

Q. Well, that is right near their house, isn't it?

A. Well, it is, oh, a mile or better, I guess, from the house.

Q. Well, a mile is nothing up in that country, is it?

A. It is that much.

(Testimony of Ben Newman.)

Q. Yes, I know it is—it is a mile but that is considered in that country not far to go to speak to a neighbor, is it?

A. Well, it is just as far in that country as it is in this country, I should judge. A mile is a mile anywhere.

Q. Yes. Now, you went there constantly then, during that same interval that you have spoken of, from the 1st of March to the 6th of April?

A. Yes.

Q. My understanding of your answer is, you intended to say that at no time did you call anybody's attention this grievance, or make any complaint about it?

A. No, sir.

Q. Now, where was it that you needed this stock water, down at the Orphan headgate, or below?

A. In Section 4, I had a bunch of cattle I was feeding. I wanted to get some water into Section 4, right west of Mr. Hanley's 3.

Q. That was at what date?

A. That was in March.

Q. And you think the reason you didn't get any, or sufficient stock water, was because of the Hanley drain ditch.

A. Well, that was the most of the condition, I guess. It would turn more water to the east there.

Q. Yet you went up and stopped it yourself?

A. Yes, but some one went and had taken those boards out again.

Q. Well, you went back frequently?

(Testimony of Ben Newman.)

A. Yes, I put them back the second time, but yet they was taken out after that.

Q. When you got down there, did you find that gave you all the stock water you wanted?

A. No, sir, it didn't.

Q. Where was the leak? What was the trouble?

A. It seemed to keep still, going to the east through the drain ditch.

Q. Through the drain ditch?

A. Yes.

Q. It would have to go through the headgate, wouldn't it?

A. Yes, sir.

Q. You just now said that very little water was going around the wings.

A. Yes, sir.

Q. So that, apparently, as I look at it, your explanation doesn't explain why you didn't get stock water.

A. If sone one goes and takes the boards out after you put them in, I don't suppose that would check the water, would it?

Q. No, it would not. But do you mean to say you have reason to believe, within an hour or so after you put them in, they were taken out?

A. I didn't say within an hour or so. I said some time within four or five days.

Q. Yes; well, it doesn't take the water four or five days to go from the drain gate to the Orphan headgate?

A. No.

Q. Yet you say you didn't notice any appreciable

(Testimony of Ben Newman.)

benefit to you down there. I am not trying to confuse you. What I am trying to get at is this: If the drain ditch did not carry away the water you wanted for stock water, what did? Where did it go? Where was the leak?

A. Well, it must have been that it carried the water away that we tried to get for stock water, because I referred that I had shut it up twice, and some one had went and taken the boards out again.

Q. Your theory is then, that the drain ditch was the trouble?

A. It was, at that time.

Q. Well, we are talking about that time now. Well, now, what was the trouble later on?

A. Well, the condition remained that way up until about the 7th or 8th of April, and I think probably some of Mr. Hanley's men shut it up again. Then we got considerable water out there.

Q. Were the boards they put in better than the boards you put in?

A. No, but they had hauled some hay and stuff, and tamped down around these places, so as it would hold them.

Q. You think stopping those leaks around the wings made all the difference?

A. It would make some difference, of course.

Q. You said there wasn't very much water going around the wings. Now, I simply want to give you a chance to give your theory.

A. I said there was not much going around the

(Testimony of Ben Newman.)

wings at the time I was there, when I put those two boards in.

Q. Now, after he stopped it up, and tamped it with the hay, then you got plenty of water, did you?

A. Yes, sir, we got plenty of water then.

Q. And that was the only change in the length of the river, so far as you know, was just that change in the drain ditch.

A. Yes, sir.

Q. Now, when was the high water this year in the river?

A. Well, I don't remember exactly the date, what time the highest water was. I didn't measure it. Some time along the first part of April, I guess, was probably as high as it got.

Q. How long did it continue?

A. Well, not a great while. I don't remember just exactly how many days.

Q. What?

A. I say I don't remember just how many days the water was at the highest point.

Q. Approximately a week—two weeks—three weeks?

A. Possibly a week.

Q. Possibly a week?

A. Yes.

Q. That would be the outside?

A. I think so.

Q. Would it, or would it be ten days?

(Testimony of Ben Newman.)

A. I don't think it would be ten days it stayed at the highest point.

Q. Did it get so high that it went out of the river at any points on the bank?

A. Yes, sir, it overflowed the banks through 27 there.

Q. That is Hanley?

A. Yes, sir.

Q. Anywhere else?

A. Not particular that I know of.

Q. His was the only place.

A. Yes, sir.

Q. Did you examine the river at that time to see where it was flowing out?

A. Yes.

Q. And on 27, on Hanley's place, was practically the only overflow.

A. Yes, sir.

Q. And you made it a point, as you say, to examine frequently?

A. Yes, sir.

Q. Had the river always been accustomed to overflow on Hanley's Section 27.

A. Yes, sir.

Q. Had it been accustomed to overflow on other sections that you know of?

A. Yes, sir.

Q. What other sections?

A. All other sections along the river there at flood time of the year.

(Testimony of W. D. Hanley.)

Q. The river bank is full of natural depressions, is it not, and cuts?

A. Well, not full, I don't think.

Q. A good many of them?

A. Well, there is some few, yes.

Q. Well, isn't the whole river bank from the canyon down more or less indented and especially where it comes out on the level, and the river bank gets higher than the surrounding country.

A. Yes, sir.

REDIRECT EXAMINATION.

Q. Mr. Newman, you stated that you didn't have enough stock water; you couldn't get it down?

A. Yes.

Q. Then later on, you said that after Mr. Hanley closed up the drain ditch, you had plenty of water—what did you refer to?

A. To the stock water.

Q. You didn't refer to irrigation?

A. No, sir."

MR. WILLIAM HANLEY.

The defendant William Hanley testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Wood:

"Mr. Hanley, by the first article of the information against you in this proceeding, you are charged with

(Testimony of W. D. Hanley.)

aiding and abetting Henry Luig in taking water out of the west fork of Silvies River by means of what is known as the Luig dam, here so called, being in Section 31, township 23 south, range 31 east, from the 15th of May till the 1st of July—no, about the month of April of this year. I wish you would state whether you conspired with Luig or anybody else in this matter, or what interest Luig had in it?

A. I haven't seen Mr. Luig only about once in three or four years. I got some cattle of him this spring, but as far as this dam is concerned, he had nothing to do with putting the boards in and closing it up. This is not a Luig dam, it is the real 31 dam, and belongs to 31. Mr. Luig's right in this dam commenced, I would say, about 1900, that they helped me construct the present dam that is in there, as a matter of accommodation, additional right to the dam that they had down at their place. They had a dam at their house, about half way through Section 6, I think is where the Luig dam really is.

COURT: This dam then is your dam and not Luig's?

A. Yes, it is the 31 dam.

COURT: Did you claim it was your dam at the time?

A. Well, I claim it now as my dam as the William Hanley Company, as the owner of 31.

COURT: Section 31.

A. This dam originally, the construction of a dam

(Testimony of W. D. Hanley.)

in 31 commenced back in the latter part of the eighties.

Q. Who built it first?

A. Pete Stenger built the first dam on 31.

COURT: Was that prior to this litigation?

A. Prior. About 1887, I think, it dates. The litigation commenced, the commencement of this was about 1900.

Q. And from the Stenger ownership to what ownership did it pass?

A. It passed to me under lease.

Q. Well, you mean the dam under lease?

A. The section.

Q. Pete Stenger had 31 leased, did he?

A. Had 31 leased.

Q. From whom?

A. From the Willamette Valley & Cascade Mountain Wagon Road Company.

Q. What was the purpose of building this dam?

A. It was to spread the water on 31 to irrigate it.

Q. Was that its original purpose of construction?

A. Yes, sir.

Q. Well, now, to Stenger, you succeeded, as succeeding to his lease? Did I understand right?

A. Yes, to his lease.

Q. Was this dam that is in question here today, the same identical physical dam that was there originally?

A. No, it is not. It is further down than the original dam.

Q. Well, when was this one put in?

A. This one was put in, I would say, in 1898.

(Testimony of W. D. Hanley.)

Q. Before the decree?

A. Yes, before any litigation.

Q. This dam was in existence at the time of the decree?

A. Yes.

Q. When did Luig get an interest in using water diverted by this dam?

A. In 1898.

Q. For what consideration?

A. Oh, just as a matter of assisting me in putting it in.

COURT: How much of his land is watered from that diversion?

A. Why, I never followed that out in detail. As a matter of fact, he could irrigate all of it from it, because it would be above it. The gravity would irrigate all of it, but I wouldn't say how much of it does actually irrigate, but I think practically all of it.

COURT: How much has he?

A. In Section 6 he has 320 acres—half of it. The river itself runs right through this half section he has, I think, all the way.

MR. WOOD: I have the deeds down in my office, and for convenience, I will ask into the record, who is the owner now of Section 31?

A. The William Hanley Company.

Q. From whom did they buy it?

A. Why, I think that the contract first was to you, and later it was turned into William Hanley Company—to you personally.

(Testimony of W. D. Hanley.)

Q. Yes. And the title is derived from this Land Grant Company?

A. From the Willamette Valley Wagon Road Company.

Q. Well, now, so far as this contempt is concerned, the putting in of those boards in the month of April you assumed the entire responsibility of?

A. Yes, sir.

Q. And exonerate Luig?

A. Yes, sir.

A. Now, by the second article of the information, you are charged with conspiring with George Young and Hull Hotchkiss and Carey Thornburg, in violating the decree by putting the boards in the dam known as the Young dam, in the northeast quarter of Section 30, township 23 south, range 31 east. Now, first as to the conspiracy, in aiding and abetting those men Young and Hotchkiss, I want you to state whether you had anything to do with them, or anything to do with that dam this year.

A. Not a thing. I have not even visited with any of them that I know of, excepting Mr. Thornburg, who has charge of 31, who handles it, and cuts the hay off of it.

Q. He has charge for whom?

A. For the William Hanley Company.

Q. So that he is your representative for 31?

A. Yes, for 31.

Q. Has Section 31 anything to do with the Young dam?

A. Not a thing. The Young dam—the Young dam

(Testimony of W. D. Hanley.)

really belongs to the William Hanley Company now. That is, they have paid Mr. Young for the dam.

COURT: Whose land is that on, Mr. Hanley?

A. It is on Section 19.

COURT: Is that on your land?

A. Yes, it belongs to the Harney Valley Improvement Company, 19, 20 —

COURT: It is on 19, is it?

A. It is on 19.

COURT: Not on 30?

A. Not on 30. Mr. Young said that he had got some hay from me, and that he was going to take it out, and if I would square off his hay bill, that he would turn me over his interest in the dam, that he didn't expect to use it any more, that he had been held for contempt, or something about it, but he said if I didn't take it, why, he would take it out. So that I squared off his hay bill, and taken his interest in the dam.

Q. Now, did Young also help to build the dam, and get the original right of water diversion, as far as you were concerned, for helping construction?

A. In which? In the Young dam?

Q. In the Young dam.

A. Why, he had been the entire owner of it up to the time that he turned it over to me. That is, as far as I know, that he was the owner of it.

COURT: That Young dam was comprised in the suit, was it?

MR. TREADWELL: Yes, your Honor.

(Testimony of W. D. Hanley.)

MR. WOOD: Yes, sir. Now, I will state to the court at this time, that I prepared Mr. Hanley's affidavit with extreme haste, and it may be inferred there is a contradiction between his affidavit and his present statement. I would like to bring that out.

COURT: Very well.

Q. I understood you, at the time I was dictating your affidavit filed here, that when you took the dam over, you didn't know that it had been the subject of a ruling in contempt proceedings. Evidently that is my mistake, because I now understand you to say that Young told you that he was prohibited from using it.

A. Yes.

Q. So your present statement here is correct?

A. Yes.

Q. Now, what was your purpose in acquiring the Young dam? For what use did you intend to put it to?

A. To get some water on Section 29.

Q. Was that involved in the decree?

A. No, sir.

Q. Who was the owner of 29 at the time of the decree?

MR. TREADWELL: Just a moment, please. We want to object to the question as to whether it was involved in the decree, on the ground the decree is the best evidence of what is involved in it.

MR. WOOD: Of course it is. I suppose we will all come to that and interpret it. I can amend the ques-

(Testimony of W. D. Hanley.)

tion by saying, did you understand it was involved in the decree.

Q. Did you understand Section 29 was ever involved in litigation?

A. It was not.

Q. I say, did you understand it was or was not?

A. It was not.

Q. Who was the owner at the time of the decree, of 29?

A. Why, the Willamette Valley & Cascade Wagon Road Company.

Q. Strictly speaking, Mr. Hanley, at that time, I think the title had all vested in Charles Altschul.

A. Well, probably in Charles Altschul.

COURT: Was Altschul a party?

MR. WOOD: No, your Honor.

Q. Well, what was your purpose in acquiring the Young dam in relation to 29? What use did you propose to make of it?

A. To get some water on 29. I have leased it at the present time, two years ago, I leased it to a party to put in grain, and I expected to use it to get a little water on this grain crop, so that I could raise some grain.

Q. Who is the fee simple owner of 29 now? Who owns the title?

A. The William Hanley Company.

Q. Now, so that there may be no confusion, regardless of your ownership of the Young dam, and regardless of your intent to use it, had you ordered it used this year, or did you know it was being used?

(Testimony of W. D. Hanley.)

A. Why, I never knew that it was being used, or it were used, till Mr. Treadwell told me at the Pacific Livestock Company's ranch, on the Sunday, I think the date is, as stated by Mr. Treadwell, May 24th.

Q. Had you ordered it to be used?

A. No, sir.

Q. And do you know now who put the boards in and who started to use it?

A. Why, I went and looked at it after all this fuss came up, and Mr. Treadwell had started these proceedings, I went and looked at the Young dam, and I seen there hadn't been any boards in it, nor there hadn't been any water went out on the east side.

Q. Well, had any water gone out on the west side?

A. Yes, there had been some water went out on the west side.

Q. Where would that go to?

A. Why, that would go onto Mr. Hotchkiss, in Section 30, I think. Yes, 30.

Q. Well, now, you said there hadn't been any boards in. There would have to be boards in, to throw that water out, wouldn't there?

A. Oh, no, no. There was plenty of water, as far as the river was concerned. It was practically full all spring. It was practically full, after the water commenced running, and I think, probably—I don't want to contradict any witnesses,—it is really bearing down a little on exceptionally dry season, while it is a dry season, but the Foley Slough has run some water, some consid-

(Testimony of W. D. Hanley.)

erable water. The Foley Slough is really the safety valve to the river.

COURT: Where is that located?

A. That is located above where the river comes into the valley.

COURT: Up in the upper valley?

A. No, in the Harney Valley, about two miles above where the canyon comes in. It is a slough that works as a kind of automatic valve to the river. When there is excessive water comes, this slough raises exceedingly high—will probably take out twice or three times as much as this river channel—and then, as it drops back, the river will hold the water and the slough will reduce much faster as it gets lower.

COURT: Operates as a reservoir?

A. Operates as automatic relief to what is known as the river channel.

COURT: Not as a reservoir, then?

A. Not as a reservoir, but it runs down on the east side east of the river. But when the Foley Slough does run considerable water, it indicates that there is an excess of what the river will carry. While I would not want to lead the Court to understand that the river was crowded full, but it was full of water all spring."

* * * * *

Q. "Now, by Article 5, you are charged with having this drain ditch unnecessarily opened in March and April, and diverting so much water from the river that it

(Testimony of W. D. Hanley.)

lowered the river and deprived them of water. I wish you would state about that—March and April.

A. The drain ditch was watched very carefully last winter. The fact of it is, I commenced last fall on a plan to see, as far as the local use of irrigation and handling of water, in every way that I would make peace with the Pacific Live Stock Company, and if there were any way at all to get an understanding so that we would not have continually these little gnats of things, and especially to be rounded up here and set as a criminal, that I would do it; and I have continuously worked at it, even to the last moment, with Mr. Treadwell, at the Pacific Live Stock Company's ranch. And the boards in the drain ditch were kept so but very little water went out at it. Last winter when we were feeding—the winter was evenly cold last winter, and the ice froze the channel clear to the bottom of everything.

Q. Of the river, or the ditch?

A. Of the river and the ditch, too. So that we couldn't really keep the water off 31 or 27. And there was no raise in the water—it was just a matter of the ice freezing to the bottom and shutting the channel off. So we watched it very closely, and as soon as the spring came, and broke up the ice and the river cleared, I issued the orders positively to have the drain ditch closed up this year and kept closed up. Also to stop the breaks along the river. The water all has to go out of what is known as this river channel between where it enters 27 and the middle of 35, as the conditions were at the time of the decree. And in doing this I have suffered the

(Testimony of W. D. Hanley.)

greatest injustice, both on 27 and on 35, by being altogether over-watered and especially with the big levee that the company has built on the south side of 27, or on their north side of 34. And in that, I went so far as to counsel with you, Mr. C. E. S. Wood, to know this spring, what was the best way to proceed to relieve ourselves of that levee. And after consultation, amongst other things—I was going to Salt Lake, but I went via San Francisco, probably more than anything else, to consult with Mr. Treadwell, as it seemed to me to be so radically unjust that they would start water from out of this river channel, and try to run it west where there was more than a foot gravity, in a mile east, that the water positively could not get out without they put up this unreasonable levee, and forced the water back onto 27, in order to get gravity so that it would run out. But I still thought, if I had to give up a crop on 27, that I would do it to see if there were some peace with the Pacific Live Stock Company, after living with a disagreeable condition existing for more than 30 years. So I went to San Francisco, and Mr. Treadwell was out, and I called his office and a young man from his office came to the St. Francis Hotel and I gave him, in notes and oral statements, my message to Mr. Treadwell. After returning from Salt Lake, I received a letter from Mr. Treadwell, that Mr. Treadwell put in the record here—also the purport of my answer to him.

Q. Well, now, before you get too far away,—I am going into this question of the conversation with you and Mr. Treadwell later on. Before you get too far

(Testimony of W. D. Hanley.)

away from the drain ditch, which is what we are talking about now,—you said that you, by stopping the drain ditch, suffered a great injustice. As I understand the decree, you can use that drain ditch, at all times of the year, when it is necessary to keep you from being over-watered. Is that right?

A. Yes.

Q. Then I interpret your answer to mean—you can explain if I am wrong—that by stopping it, and trying to avoid trouble, you really over-watered your land?

A. Yes, sir.

Q. Instead of draining it off?

A. Yes, sir.

Q. And at what time was that?

A. Well, it was early in April, that I ordered these boards, and told them to haul manure, and such stuff as would actually stop all the water from going through the drain ditch.

Q. What is the engineering plan, or arrangement by which this drain ditch protects you from flooding?

A. The drain ditch was constructed by mutual agreement by Mr. Gilchrist and myself, about 1893; and the whole object of it was—the east side of the river, in 27 and 35 and 36, were all tule and flag marshes, excepting little high places, where some hay were cut; also on the west side of the river there was 34 and the lower part of 27 that is the south part of 27, were tules and flags—and the object of this drain ditch was to carry away this surplus water to Embree Slough, so as to make those lands productive of a good crop of wild grass hay.

(Testimony of W. D. Hanley.)

Q. How did it get hold of the water? Where was the intake?

A. The intake was from the river channel itself, and the theory of it was, to take it out of the river channel before it spread over the banks. The top of the bank of what is called this river, is practically level from there to below the middle line of 35, a mile and a quarter, there is not a variation in the real top of the bank of what is called this river channel; and as originally, at the time of the decree, which Judge Webster and Mr. Minor both said to me —

MR. TREADWELL: Just a moment, your Honor. This decree is not only here before the Court, but it has been construed by this Court, and it has been construed by the Circuit Court of Appeals. Now, are we going to go into outside evidence as to its meaning on this subject? The Court has said it doesn't mean what they claim.

MR. WOOD: Well, let that go. It is too far back, and as Mr. Treadwell says, the decree is written now. Let us stick to the proposition of what was intended by the drain ditch, and how it accomplished it.

Q. I understand you that it was, as you spoke of Foley Slough being an automatic safety valve, so this drain ditch was a safety valve to lower or to help carry off part of the flood of the river.

A. The excess water from the river. I would say that the difference in the change of that country that was effected by that, that that drain ditch really made a

(Testimony of W. D. Hanley.)

difference of 2,000 to 3,000 tons of hay in that location there.

Q. Then what water the drain ditch does take away, where does it deliver it?

A. It delivers it to the Embree Slough.

Q. Does the company get the benefit of it then?

A. Yes, sir.

Q. Now, you say you gave the orders early in April to stop the head of the drain ditch, and that you suffered in consequence? But how about the month of March—was there any necessity for you to use it for drainage purposes in March?

A. Well, it was very technical in the winter to do anything to keep the land from being flooded, on account of the water that were coming, what little water were coming, spreading all over our fields.

Q. Why —

A. So that we couldn't feed in them.

A. I know, but why did this water have a tendency to spread?

A. On account of the ice in the river channel.

Q. In the channel itself?

A. Yes, in the channel itself.

Q. In other words, there was what you might call an ice dam?

A. It was filled with ice. The channel was actually froze down.

COURT: Was that an unusual thing?

A. Yes, I would say it were, Judge. Last winter was evenly cold for a long period, and the ice froze ex-

(Testimony of W. D. Hanley.)

ceptionally deep. But this is practically no channel down through there—there is no gravity to it. It is no channel through there to speak of. If it were pretty well open, it would go through—the water would go through; but otherwise it takes but little to obstruct it.

COURT: Another season, when the ice is not frozen to the bottom of the channel, does it gorge when it breaks up?

A. Oh, no, it doesn't have current enough for that. It just simply lays there.

Q. Where is it you mean to say that the channel is so sluggish it takes very little to obstruct it?

A. Through 27 and 35.

Q. Yes. Now, how about this drain ditch head-gate being rotten and leaky? When was it built, or when was it rebuilt, if at all?

A. It was repaired last fall. I didn't only ride up to the gate a few times—it really looked in very bad order.

Q. Who did the repairing?

A. Mr. George McLaren and the McLaren boys under him.

Q. He is here, isn't he.

A. Yes, sir.

COURT: Under your direction?

A. Well, yes, under an order to repair the gate, put it in order.

Q. When was that done?

A. Last season.

(Testimony of W. D. Hanley.)

Q. Now, you are accused of making cuts in the river bank through 27, for the purpose of facilitating the slopping over of the river for your benefit on that section, and there are some photographs here, or at least one, which I think I showed you, with a pole stringer across the gap, and some perpendicular boards laid in. I wish you would state whether you cut any gaps in the river bank at all, or did anything to lower the level of the bank, so as to aid the water of the river getting out?

A. I have had a man upon Section 3 working on the river, with an assistant whenever he needed it, with special instructions to keep those gaps closed up; and when I went down with Mr. Treadwell, it was the first time that I had been down along the channel this season after the water came, and the water were coming out every place, and of course, there might be some little nicks where it would cut; but I have no knowledge of any such a place being on the river; and if it were, why, it was just because it had broken itself out. There is dikes built along there, and they are not really overly substantial, most of them, and when the water breaks through a couple of feet above the surface of the ground, and if it gets started once, those places cut out very quickly. If there were any place there, it certainly cut out. The man that was down there had full instructions to close them up, and I have brought him here as a witness.

Q. What do you mean by cut out? Cut out by your men, or by the action of the water?

A. Cut out by the water—by the water.

(Testimony of W. D. Hanley.)

Q. You say you gave instructions that the low places should be repaired or filled, and the water kept in the river as far as possible; but do you know whether they were carried out or not?

A. Well, this time that I went with Mr. Treadwell down there, and I know the river very well, it were in very good repair; it was an excessive amount of water, to have to go over the bank the way we have operated it ordinary years.

Q. Regardless of this year, and the strict language of this charge, have you ever sent out men, or given orders to have the natural bank of the river artificially cut into to let it out on your land?

A. No, sir.

COURT: Do you know of any cuts being made without your order?

A. Oh, no, there have been no cuts made by our people.

COURT: Or anybody else?

A. No, by nobody else. I do not think there have been any cuts made. If there is any cuts in there, they have washed out.

COURT: It is a wash?

A. Yes, the water goes out of there very swift.

Q. Now, there was something said by Mr. Griffing when he was on the stand that he saw shovel marks, or spade marks, on the edges of these cuts, showing that they had been artificially made. Do you know anything about that?

(Testimony of W. D. Hanley.)

A. Why, I don't know anything about it. If they were, it was probably made by the man that was in charge just stopping up those places. Probably the places that he put in went out; but I didn't have any personal knowledge of inspection.

Q. Now, why are you so, sure that you had it in your mind and gave the instructions that this bank was—even its natural depressions were to be kept tight? What was your reason for it?

A. Well, I came to Portland to consult with yourself and Judge Webster regarding this levee that was built south of the line of 27, and I suggested my plan that I would suffer most any injustice, if there could be a condition brought about, that even if we didn't agree upon the big principles of the case, these matters that we have litigated so thoroughly that we get down to an understanding, and operate them so they would be satisfactory.

Q. Well, it was like closing the head of your drain ditch, was it, in an effort to be overly careful?

A. Overly careful—overly friendly.

Q. I wish you would take up, the question of a new bridge—

COURT: Before you come to that, Colonel, I would like for him to explain the condition of that levee.

MR. WOOD: Yes, we will get down to their Section 34, just south of your Section 27, and explain the river conditions there, and especially in relation to the Orphan ditch and the levee.

(Testimony of W. D. Hanley.)

COURT: I want to know the height of the levee, and the condition of it.

A. I have been so rushed that I didn't get time to have a surveyor run over it; but I was there the day before—Saturday—and I was to come here Sunday, and I taken a couple of witnesses that are here, and went to the Orphan headgate. Now, we have all of the water shut out of the river onto land outside. It is on 21, on the west side of the river, and the water is all shut out of the river channel; and the water at the Orphan headgate, in the bottom of it was 12 inches deep, and the water at the other end of the ditch was just standing still—barely moving; that is, the west end of the ditch. This ditch is from the east line to the west line of 27—a mile long. The levee apparently is from four to five feet high, all the way through.

COURT: That is on the south side?

A. On the south side; and the lake of water above it, I would say covers 160 to 200 acres.

COURT: On Section 27?

A. 27.

COURT: I understood Mr. Gilchrist to say that the waters had rushed out this year so that at the present time, it was not of any use to hold the water.

A. Oh, the levee is in perfect repair. It is holding the water—it was the day before yesterday.

Q. Mr. Griffing has testified, if I remember correctly, that Mr. McLaren told him that all these gaps and breaks in the bank on 27 formed a regular part of your irrigation system. Is that true?

(Testimony of W. D. Hanley.)

A. The water running over the banks.

Q. I don't mean the natural flow of the river. What I meant to say was, the impression I got, at least, was that you stop and open these things, and just use them as you would check gates or head gates, as you would a part of your irrigation system.

A. No, we don't open them. We aim to use the river so it will work out evenly on the top of the banks and regulate the quantity of water that works over the bank.

Q. They produced this as apparently one of the parts of your irrigation system in one of those gaps. You will find a description of it on the back (Exhibit 15). Do you know anything about it?

A. No, sir; I haven't been on that bank, and stopping up the drain ditch—stopping up the drain ditch, this kind of a place might appear that way in the photograph and look like a big lot of water going out of it when really it is just nominal.

Q. You mean stopping the drain ditch might be so much water in the river?

A. Yes.

Q. This is not letting water out of the river—that is holding water in, isn't it?

A. That is attempting to hold it in. It looks like that it has broken out.

Q. The river is this side, isn't it?

A. Yes, the river is this side. It is on the east bank. I would like to state as far as any complaint of that is concerned, that I do feel it is an awful injustice, when

(Testimony of W. D. Hanley.)

they would come to a court, and make these complaints, when, if they would let us know that they were having so much feeling about it, we would a hundred times rather stop them.

Q. Right there, have you had any complaints in these matters yourself, at all, personally?

A. Not a word.

Q. Have you had any brought to you by your subordinates or employes?

A. Not a word.

Q. Now, there is a statement here that there was a board across one of the open sections of the 21 dam. I will state it is a little more definitely stated in the evidence that that board was about four feet long and six inches wide, and that there was also brush suffered to gather in the dam, so that it made an obstruction and raised the water above the 21 dam about a foot, and that all this happened in the months of March and April of this year. Do you personally know anything about that?

A. I was at the 21 dam last fall, and I wasn't there again until this spring.

Q. What time this spring?

A. In April, after these water cases came up.

Q. Which water cases?

A. Adjudication, the taking evidence.

Q. You mean out in the State Court?

A. Yes. And I went to the 21 dam, and went up along the line of the 21 ditch. That is on the west side of the river, a little ditch leading right down along the bank of the river. And I was surprised when I got up there,

(Testimony of W. D. Hanley.)

that even this little manure level that had been hauled across there, that it hadn't been taken out so the water could run out in 21. And then I went onto the dam. Judge Webster was with me, and he says that "Those people are complaining about some willows being in there," and said there was a board or two in there. I went and I didn't see any board. There were some little willows on top of the water. The water breaks with the current—the 21 dam is probably two feet higher than the level of the river, and it breaks away with the current. These little willows was laying right on top of the water, which couldn't hardly be classed as an obstruction, but I gave Mr. McLaren and Mr. Sterling orders to see that they were taken out.

Q. Now, would these willows that you saw, or the obstruction that you saw, raise the river level a foot?

A. No, they wouldn't raise it at all.

Q. What time was this you saw it with Webster?

A. Why, I should judge, about the 20th of April.

Q. And that was the first you had seen it yourself, or the first you had heard of it, was it?

A. Yes, sir. Yes.

Q. Now, it says that, during the months of March and April, by means of this brush, and the boards, the water of the river was raised at least a foot higher than the floor of the dam—by means of the brush and the board—and was diverted into the Hanley upper ditch to a greater extent than 40 cubic feet a second.

A. No, that is not true. It didn't divert any water. In fact, why, we would have—if this little trash would

(Testimony of W. D. Hanley.)

have been taken out of the head of 21 ditch, it would have been carrying onto 21, which had been dry all spring, I would say anywheres from five to 20 second feet. We haven't been technical to the use of the water in all those little details; but we haven't taken out the water at that place there that naturally would have run out, if we would have been technical about trying to get it out.

Q. Has this dam 21, in common with all the other dams as I understand the usual custom of construction there, a tie-board or string board nailed across it, which is higher than the floor of the dam?

A. Yes, it has a board across that is higher than the floor of the dam.

Q. So that would raise the river, wouldn't it?

A. Yes.

Q. Now, getting back to the original information, in order to cover the particular details of the information, I am going to run over to you these cuts: In the left bank of the east fork, the left bank of the east fork of Silvies river, 900 feet below the Hanley drain ditch, a cut 12 feet wide and 3 feet deep. Did you have any such cut made, or order any such artificial cut there at all, artificially made?

A. Where is that at?

Q. 900 feet below the Hanley drain ditch on the left bank of the river.

A. Which way was the fellow going?

Q. All this is downward. The east bank, that would be.

(Testimony of W. D. Hanley.)

A. East bank?

Q. East bank of the east fork.

A. Well, there is cuts in the river——

Q. Now, I want to distinguish between artificial cuts and cuts by the water. Which do you mean?

A. Oh, there is no cut in there only by the water. Those cuts are the original cuts that were in there when I first came to the country. I cut hay on 27. I cut hay on 27 in 1882 and '83. Those cuts were in there then.

Q. Now, on the same bank of the river, the left bank going downstream, the east bank too —

A. I think they are in repair.

Q. About 1,000 feet—I don't care if they are in repair, I don't care if the whole river goes out there. The question is whether you made them.

A. No.

Q. Or suffered them to be made.

A. No.

Q. Or whether they are artificial cuts.

A. No.

Q. That is what I am driving at. I don't care anything about the capacity of water. I want to know whether they are artificially made cuts. Then about 1000 feet above—I suppose that would be to the north of the south line of Section 27, township 23 south, range 31 east, another cut about 12 feet wide.

A. Which side of the river?

Q. Left bank, east side, a thousand feet above the south line of Section 27.

A. We have no cut in there."

(Testimony of W. D. Hanley.)

* * * * *

“Q. Now, that suggests a point in Mr. Treadwell’s testimony, that he had a talk with you, in which he mentioned the 31 dam, which they call the Luig dam, the Young dam and the People’s ditch, and that you said something to the effect “Take it from me, I am responsible for all of these.” Is that so?

A. I have a little personal hesitancy in testifying on a direct question that disputes Mr. Treadwell, and especially, when I were trying to make an alignment that we talked about things in a different way than I ought to testify about them; but I only want to say that Mr. Treadwell did misunderstand me. I only meant the 31 dam. The 31 dam, I meant to convey to Mr. Treadwell that I were responsible for the boards being in it; that I had instructed Mr. Thornburg to put them in, and that I were responsible for that. Now, when I met Mr. Treadwell there on Sunday we went over to their office, and talked, and Mr. Treadwell seemed to be pretty well stirred up, and he told me about the water on the east river being out at all these places.

Q. Do you mean the east river?

A. On the west river, the west river. And he says; after I had told him that I were responsible for it, he says: “You take them out, and then I will tell you afterwards whether I will sue you or not.” And I said to Mr. Treadwell well: “I wish you would withdraw that statement, because we have been litigating long enough. You ought to understand there is no use for to try to bluff one another, nor to try to make any assertions, but I

(Testimony of W. D. Hanley.)

have started out this year to see if I can get along with the Pacific Live Stock Company, and I am willing to go clear down the line to do anything to see if we can arrange a truce that we can get along. And you understand that I have to go with these parties to the P. Ranch today, and I will get back here tomorrow about noon, or as close as I can get back."

Q. What day of the week was this?

A. That was Sunday, and I would get back Monday, and then I said: "Mr. Treadwell, I will go down along that river with you, and see. I don't care about a little gnat of water, or anything. I want to see if we can work something up that we can get along for a truce to work out this common irrigation with." And Mr. Treadwell replied to me, he said: "I am going to Burns now to consult with Mr. Gilchrist, but I will let you know after you get back." When I got back —

Q. When was that—how long a time?

A. That was Monday—Monday afternoon. And I seen Mr. Treadwell on the street, and he made the remark about as he said it, as near as I could say, but indicating to me that he had seen that the dam on 31 was torn out, and that the suit was begun.

Q. Now, where was this conversation, the first one, I mean, in which Mr. Treadwell said "You go and take them out, and after that I will tell you what I will do, or whether I will sue you or not."

A. That was at the Pacific Live Stock Company's ranch at the island. Now, Mr. Treadwell raised the subject on their land case, and he said: "You ought to help

(Testimony of W. D. Hanley.)

us.” And then I said to Mr. Treadwell, I said: “Mr. Treadwell, this is the first time that I have been on this ranch for 20 years, by invitation, and I never have had any alliance or no common friendship with the Pacific Livestock Company, but I want to say to you that I am no party to these cases. I don’t know anything about it, further than I have seen in the papers, and I think you are making a big mistake to make an assertion of that kind, because I don’t know as if you understand my feelings, but I am not an agitator that caused this case to be brought, and I don’t know where to take hold to help you, nor where to take hold to hurt you, because I don’t really feel as if I have any acquaintance with you that would put me in a position to know what to do when you speak that I could help you.” Well, he said: “You bet you could help us.” And then this other conversation followed on the condition on the west river.

Q. Well, now, Mr. Treadwell testified about driving down with you along through Section 27, into 34 and 35, to the Orphan headgate.

A. Yes.

Q. If I remember correctly, I got the impression that in that conversation, he called your attention, in a general way to other things than the 31 dam, the flooding of the water on 27 and so on.

A. Yes, he did. Mr. Treadwell stated, he said that Mr. Corcoran may come down there, and said: “You ought to get that water off 27.” And I looked at him and laughed. I said: “Mr. Treadwell, it is perfectly ridiculous for me to talk about getting it off.” I said:

(Testimony of W. D. Hanley.)

"I have no way to get it off. That levee there is the only way to get it off." I said: "I can't get it off."

Q. And whose levee was that?

A. That was their levee.

Q. Now, what I want to get at, and I will suggest it somewhat—you have said you had no complaint made to you, no request to clear these things up except this talk with Mr. Treadwell about 31; that you didn't know of these things complained of in the contempt; and I want to know if this conversation with Mr. Treadwell brought to your mind any understanding that he was complaining of these definite things stated in the contempt proceeding.

A. Not a thing. Mr. Treadwell and myself, the first Sunday that we went—that was a week before that we were at the Island Ranch, we went from the Belle A Ranch down the river, and I was showing Mr. Treadwell all the conditions there, showing him how the water ran over the banks of the river, explained to him that it all had to come out before it got on down below; and we stood on the—we stood on the Orphan headgate, the bank that is banked up there, and Mr. Treadwell said to me: "Mr. Hanley, now," he said, "We want to get along with you. If you will suggest to me any comprehensive plan of building canals, if you will submit it to me, I will try and see if we cannot work it out." Well, now, I said: "Here, Mr. Treadwell, we are both full-grown, and just as well commence right now." I said: "In the first place, the water will run on every north and south line, and every line east, the water will all run south,

(Testimony of W. D. Hanley.)

and it will run east on every section. Now, your Orphan headgate and your levee is running against the grade of the country. It is going the other way. The question of working out this little condition here isn't anything. But now," I said, "Just stop right here and let us look right down below the Orphan headgate. Let us commence at that first. Let us see if we can get along on these things that is bothering us right now, and then work out from that. Now," I said: "This channel ought to be opened—it ought to be opened clear down on the line between 35 and 34. I want to say to you"—and I want to say to this court—"that I am willing to do that any time as soon as the water dries down, I will do it any time." The only thing I do want the protection of the rights that belongs to those sections. The right of way for that was made out in 1893 by agreement with Mr. Gilchrest, and we went and mowed it out and got ready for it, and the company never come—never come to join us to put it in. All of the fall of 1893, we were ready to put it in.

Q. You mean you were willing to open up this channel spoken of by Mr. Gilchrest—you are willing to make the physical improvement, but you don't want to lose your legal rights for lands acquired subsequent to the decree?

A. Or I want the conditions of the decree amended so that I hold my rights to irrigate these lands. The whole country in that overflowed country needs drainage worse than anything else.

(Testimony of W. D. Hanley.)

Q. What do you mean by you want the conditions of the decree amended?

A. So that I would retain my rights to irrigate after I had helped to put in this canal to drain it, I want to retain my rights to irrigate it.

A. Yes. Well, what did Mr. Treadwell say to that?

A. Well, Mr. Treadwell said to pass that along. Now I said, "Mr. Treadwell, how far will you go with the development of this country?" He says: "I will go to the extent of canals to develop our lands." Well, I said: "All right, I will go along with you, but" I said, "I want to go even farther than that. There is no use to complain about flood waters and the conditoinis of flood waters, when they break loose themselves, and come puring down onto the country, that we cannot handle them"—I said, "I will go so far as to put my land in to construct reservoirs to hold these flood waters back." Mr. Treadwell said to me: "We don't want any reservoirs." So then we went back, and talked about other matters. And then we had another talk at my office, and I said to him: "Now, Mr. Treadwell, we have made the trip, and we have talked about all of these things, and we haven't settled anything. Now, what about this Orphan Headgate and the condition there? The Orphan Headgate being opened, it does rob me of my rights to irrigate those lands down below."

Q. You mean that the Orphan Headgate being

(Testimony of W. D. Hanley.)

open and diverting water gives you a different wrong than the levee backing the water up on 27?

A. Well, that leaves the chance for water to get down below first; then of course, the levee backs the water up on 27.

Q. They are two different things?

A. They are two different things, but both of them are in effect a damage to me.

Q. Then you can go ahead and state what you were going to, I just wanted to get it straight.

A. When we got back up to the office, that was really what we talked about, was relieving the levee, and closing up the Orphan Headgate.

Q. In what way does the diversion of the river at the Orphan Headgate hurt you?

A. It takes all of the water out of the little remnant of the channel that forces it over 35 and water for the Fennimore dam at 3.

Q. What times were you personally present up in Harney Valley this spring during the months of March and April?

A. I was in Harney Valley practically all of April, and March, I think, maybe.

Q. If counsel have no objection, to my refreshing your memory, I don't think you could have been there all of March. Wasn't it March you came down to see me, and went on to Salt Lake City?

A. Oh, yes, that was in March.

Q. About what time in March was that?

A. Why, I would have to look up something?

(Testimony of W. D. Hanley.)

Q. It would be pretty close to the date of Mr. Treadwell's letter, would it?

A. No. No, it would be some earlier than that, but pretty close to it. I know that I had went to San Francisco, and Salt Lake, and got back home before I received his letter. And I am not able to state from memory whether the letter came in the mail after I got home, or whether it was waiting for me when I did get back to the Belle A Ranch.

Q. Just before we get too far away from it—I think you spoke of the Fennimore Dam, or the Fennimore property. What is the description of that property?

A. The south half of the northwest quarter.

Q. As the river runs, that is below the Orphan Headgate?

MR. TREADWELL: Section 2, isn't it? The dam is not on the Fennimore property at all, as I understand it.

Q. What property is the Fennimore property itself? Did you describe that?

A. Section 3, in 24-31.

Q. Section 3, in 24-31?

MR. TREADWELL: 2, isn't it?

COURT: Section 2 or 3?

A. 3. But the Fennimore place is in 2. We call the place there as Fennimore—known as the Fennimore house.

COURT: Which Hanley place do you call that—the Fennimore place?

(Testimony of W. D. Hanley.)

A. Yes.

COURT: Section 3?

A. Section 3.

Q. Where is the dam itself? The dam is on different property, isn't it?

A. The dam is on the northeast corner of 3.

A. And this is how far below the Orphan Headgate?

A. A mile.

CROSS EXAMINATION.

Questions by Mr. Treadwell.

Mr. Hanley, referring to this dam that we call the Luig dam, you know that in the final decree in this case, it is stated that Mr. Luig owns the dam in Section 31, which he is permitted to maintain at certain times, and prohibited from maintaining at any other time, do you not?

A. Why, I didn't know it.

Q. Haven't you almost been sleeping with that decree for the last 10 or 12 years, Mr. Hanley?

A. No, sir, Mr. Treadwell. There is where you are wrong.

Q. Well, I must confess that it looks that way.

A. No, sir, I have not.

Q. You say you never have seen it?

A. I have seen it.

Q. You never have read the decree at all, have you, or taken any notice of it?

(Testimony of W. D. Hanley.)

A. I have read the decree.

Q. You don't care very much about it one way or the other?

A. Well, I aim to respect my part of it, Mr. Treadwell.

Q. Have you ever taken the trouble to read it, Mr. Hanley, or not?

A. Yes, I have read it, Mr. Treadwell.

Q. When did you first learn, Mr. Hanley, that there was a provision in that decree that Mr. Luig could have that dam and maintain it at certain times only?

A. Well, I were not a party to that, Mr. Treadwell, and that never was Mr. Luig's dam.

Q. I am not asking you that. I am asking you when you first knew that that provision was in that decree.

A. Well, I would say directly it had never been brought to my attention until this contempt case came up.

Q. Never been brought to your attention at all until this contempt commenced. Mr. Hanley, you put in an answer when that case was brought against you, didn't you?

A. Yes.

Q. And you set up that you owned a dam known as the 21 dam, did you not?

A. Yes.

Q. You set up that you had a ditch there, and probably two ditches, did you not?

A. Yes.

(Testimony of W. D. Hanley.)

Q. And you didn't set up that you owned this dam in Section 31, did you?

A. No, I didn't own 31.

Q. I am not asking you that. I am asking you if you set up that you owned the dam in Section 31 in your answer in this case.

A. 31 dam was never in this case.

Q. We will come to that, Mr. Hanley. I am asking you if you set up in your answer in this case, that you owned the 31 dam when you put your answer in in this case?

A. Well, I don't think that is a fair question, Mr. Treadwell. The record itself will show that.

Q. And you couldn't say, then, without reading the record, whether you did or you didn't? Is that the idea?

A. Well, I will say this: that in the wind-up of this decree, that Mr. Minor himself—

MR. TREADWELL: Now, I object to this, your Honor—attempting to state anything that Mr. Minor said. It is hard enough for one attorney to have to testify in this case.

COURT: Just testify, Mr. Hanley.

Q. Are you unable to state, without looking at the record, whether in your case, and in your answer, you set up that you owned the dam in Section 31, or any dam in Section 31?

A. I wouldn't answer that question, Mr. Treadwell, without the record.

(Testimony of W. D. Hanley.)

Q. You wouldn't answer. You do know, Mr. Hanley, that you agreed to the part of the decree which you say affected you? You know that much, don't you?

A. Well, now, Mr. Treadwell, it was not a decree—it was an agreement.

Q. You entered into a stipulation in this case, didn't you?

A. And it was understood it was an agreement.

Q. Wait a minute. You entered into a stipulation in this case, didn't you? Is that right?

A. I think so, yes.

Q. And it provided that a decree should be entered, did it not?

A. Well, it did not provide that it was a decree.

Q. Didn't it provide that a decree would be entered in the case on that stipulation?

A. It was an agreement.

Q. Will you answer that question?

MR. WOOD: I think you are asking him legal questions. Evidently his counsel handled it.

COURT: Wouldn't the stipulation show for itself, Mr. Treadwell?

MR. TREADELL: Yes.

MR. WOOD: Yes.

MR. TREADWELL: I will leave the question where it stands. It is satisfactory.

Q. You knew the decree was entered, did you not?

(Testimony of W. D. Hanley.)

A. Well, I have had two or three very severe notices served on me since that it was.

Q. Well, then, you knew that it was entered?

A. Yes, sure.

Q. You have read it, have you not?

A. I say that I have read it.

Q. You know that it embodies the stipulation that was entered into on your behalf, do you not? You know that, don't you, Mr. Hanley?

A. In regard to the 21 dam?

Q. Yes, regarding the 21 dam.

A. Yes.

A. You know that stipulations says that decree may be entered against you, enjoining you from, in any way, shape or manner, obstructing the east fork or the west fork of Silvies River, except by your 21 dam, and the 21 ditch, do you not?

A. Well, Mr. Treadwell, now, I am not under the impression that it barred all my rights for the balance of my natural lifetime.

Q. I am not talking about what effect it had from a legal standpoint.

A. My understanding is from the standpoint of a citizen that lives in the country, that interprets things as he understands them, without having learned technical knowledge that there is certain things that I have agreed to that bound me on the 21 dam, on the 21 ditch, and the upper Hanley ditch, and the drain ditch, etc.

Q. Well, now—

(Testimony of W. D. Hanley.)

MR. WOOD: I want Mr. Treadwell to get everything that he wants during his stay here, but it seems to me it is asking this man to legally determine the meaning of a written decree and stipulation.

MR. TREADWELL: No, I don't care for that. I don't care for him to interpret it at all. He is trying to interpret it.

MR. WOOD: I would be glad to have Mr. Hanley interpret it, if the court will permit.

MR. TREADWELL: I don't think his interpretation would help us any.

Q. When was the time you first got the control of this dam in 31?

A. I think in 1898.

Q. And Mr. Luig was also using it then, was he?

A. Mr. Luig assisted me in putting it in.

Q. That was the first you had anything to do with it, when you put in this particular dam?

A. We were re-putting in a dam which was above, known as the old Stenger dam, which was specially the 31 dam.

Q. You put in a dam, as I understand it, at the very point where this dam is now, in Section 31, in 1898? Is that what I understand you to mean?

A. In 1898. I say that from memory.

Q. You say there had been an older dam at some other point?

A. Yes.

Q. Where was that?

(Testimony of W. D. Hanley.)

A. It was above.

Q. How far above?

A. Oh, a quarter of a mile.

Q. A quarter of a mile?

A. Between a quarter and a half, probably.

Q. That would be up very close—it is in the same section?

A. All in the same section, yes.

Q. That had washed out, had it, or what?

A. Washed out.

Q. And which Mr. Luig helped you put this dam in, or which Mr. Luig did you help put it in, whichever it was?

A. Casper and Henry.

Q. They both worked on it, did they?

A. Partially.

Q. Had they had anything to do with the Stenger dam before that?

A. I don't know as they had.

Q. Your understanding was that they had not, as I understand it?

A. Well, I would say that probably they had, and probably they had not.

Q. How did they come to help you, or how did you come to help them, whichever it was?

A. At our own initiative, and suggestion that we put it in. I think that Casper Luig that year rented the northeast quarter of Section 28, and he was rather a frequent visitor at the Belle-A Ranch, and we put it in that spring temporarily.

(Testimony of W. D. Hanley.)

Q. You understood that he claimed a right there to the whole dam?

A. Yes, I understand that he has a right there.

MR. WOOD: You are talking about the old Stenger dam now?

A. Well—

MR. WOOD: He is talking about the old Stenger dam.

A. I would put that more this way: that pretty near any of the neighbors that wanted a right, or an interest in any of those things, why, they could always have them.

Q. Was there any dam at this point where this new dam was put in, at the time you put it in?

A. No, there was no dam there then.

Q. Didn't you say in the opening of your testimony—

A. I don't know, Mr. Treadwell but what maybe the first dam that we put in was higher up than where the present one is. I wouldn't be right sure.

Q. Have you rebuilt it since?

A. Yes.

Q. When did you rebuild it?

A. I think probably the second year after we put it in.

Q. What year do you think that would be—about 1900?

A. 1899.

(Testimony of W. D. Hanley.)

Q. Well, didn't you say in your opening testimony that Mr. Luig had no interest in this dam until 1900?

A. Well, I don't know, Mr. Treadwell, but Mr. Luig only has a neighbor's right in it. That dam belongs to Section 31.

Q. Well, I am asking you what you testified to. Didn't you testify, when you started off your testimony, about this Luig dam, that Mr. Luig's interest in that dam dated from 1900?

A. Well, I think Mr. Luig's interest in it dates earlier than that, because whenever we did do the first work, why, he had an interest in it.

Q. You also think that he had an interest before you did the first work, in the old dam that you were replacing?

A. Oh, no. That dam serves two sections, you know. 31 and 5 is served from that dam.

Q. At any rate, your statement here that his first interest was in 1900 is not right? Is that right?

A. Well, I wouldn't say that, Mr. Treadwell. Whenever we done the first work together, Mr. Luig had a neighbor's interest in that dam.

Q. When did you rebuild it again, if you have rebuilt it since?

A. No, no.

Q. So it was there in 1898? Then you rebuilt it again in 1899 or 1900? Is that as I understand?

A. Somewhere along there. I may be a year behind on my first statement.

Q. You know, don't you that Mr. Luig all this

(Testimony of W. D. Hanley.)

time has been operating this dam under this decree, ever since that?

A. No, Mr. Luig has not.

Q. He has not?

A. No.

Q. Mr. Luig has never touched the dam, I suppose?

A. Oh, he probably has.

Q. He probably has, or probably hasn't—which is it?

A. We haven't been restricted with this dam, and we haven't had any special time of putting it in. This dam has been put in by us, whenever we wanted to put it in.

Q. You mean to say, Mr. Hanley, that ever since this decree has been entered, you have absolutely disregarded the decree as to this Luig dam?

A. Every year, Mr. Treadwell.

Q. Every year?

A. Every year.

Q. You just simply and absolutely disregarded the decree altogether?

A. Every year that dam has been put in by us, and it has had no care about dates. Now, it might have went some years way over—I don't know—because I have never given an order that this dam was under the decree at all.

Q. What land did it irrigate since that time?

A. 31 and 5. Now, I think to clear this thing up a little—

(Testimony of W. D. Hanley.)

Q. You can't clear it up with me, Mr. Hanley, the least bit, except by answering my question.

A. Maybe I can with the Court, Mr. Treadwell. I have a reason for disregarding that. I have a reason for disregarding it.

Q. I am asking you this question, Mr. Hanley: It irrigated the lower part of Section 31, and Section 6, did it not? Isn't that a fact?

A. Yes.

Q. And Section 5?

A. Yes.

Q. You also own Section 5, don't you?

A. Yes.

Q. We will come to that in a moment. Now, this dam is in very low, away down in the lower part of Section 31, is it not?

A. Pretty well down, yes.

Q. About how much of Section 31 does the water that floods out from that dam irrigate?

A. Oh, that dam affects 31 two-thirds of the way up.

Q. Who operated the dam since the decree in this case? Who put the boards in?

A. Well, I wouldn't want to go back further than Mr. Thornburg, without giving it a little special thought.

Q. How long has Mr. Thornburg been employed by you there?

A. I would say just off-hand, about four years.

Q. About four years. And before that did you have anything to do with it at all?

(Testimony of W. D. Hanley.)

A. Oh, yes.

Q. Well, who operated the dam then?

A. I will try to work up that detail, if I will be given a little time.

Q. You can't work it up better than right now, for me, Mr. Hanley.

A. Well, I haven't got it.

Q. Have you ever put those boards in that dam before this year yourself, outside of the time permitted by the decree?

A. Well, now, Mr. Treadwell, I will tell you. It has been a long time since I put in any boards, or did any such work.

Q. Well, you can answer that yes or no. We will get the rest of it.

MR. WOOD: You mean with his own hands.

MR. TREADWELL: We will get to that.

A. I would say no.

Q. Have you ever been there and ordered it done before this year?

A. Yes.

Q. Now, what year did you do that?

A. You mean right at the dam?

Q. Yes.

A. Right at the dam?

Q. Yes, or that you know that the boards were put in at any time when it was not permitted by this decree?

A. Well, I don't know, Mr. Treadwell, that I can state any specific time. I have given an order on this dam that is regardless of any decree.

(Testimony of W. D. Hanley.)

Q. You specifically told your people to disregard the decree so far as that dam was concerned?

A. No, I have not, no, sir.

Q. I want to know what you mean.

A. No, sir.

Q. What did you tell them?

A. The only object in putting it in would be if we need water.

Q. What you are telling the court is that that dam has been used every year during the time that it was prohibited specifically by the decree in this case.

A. Well, that dam has been used every year, Mr. Treadwell—every year since the decree, and before.

Q. Why, sure. We all know that, Mr. Hanley.

COURT: That is again indefinite. I should think the time—

MR. TREADWELL: Yes, the time is the whole thing.

Q. There is no question about this dam being used, Mr. Hanley, every year. I am asking you, has this dam been used before the time the decree permitted it to be used, on the 12th of May or the 15th of May, I believe it is, by this decree? That is what I am asking you.

A. Well, I am not prepared to state right now, Mr. Treadwell, but I will say this to make it plain, that I did order the boards put in this year.

Q. I know you did this year.

A. Yes.

(Testimony of W. D. Hanley.)

Q. But outside of this year, you wouldn't say that anybody violated this decree in regard to that dam?

A. Oh, my, yes.

Q. You would?

A. Yes.

Q. Well, now, who?

A. The violation, if it was not technical, it was in other way that we have been under the impression—that I have personally been under the impression, and would give an order any time that we would put in the boards in the dam any time that we wanted water.

Q. I am asking you the question: Can you state any person that ever put the boards in that dam before the time permitted by the terms of that decree, excepting this year?

A. Well, I won't state it now, Mr. Treadwell.

Q. You can't state it now, can you?

A. No, sir.

Q. Now, in regard to this Young dam, when was it that you made this trade with Mr. Young, in regard to your interest in this dam, or the old dam?

A. I think about two years ago.

Q. Now, you remember when Mr. Young was over here and charged with contempt, you heard about the matter in a general way, did you?

A. Well, I know about it in a general way.

Q. There was considerable publicity given to it, was there not?

A. Well, I don't know as there was.

Q. You didn't think there was?

(Testimony of W. D. Hanley.)

A. No.

Q. You didn't? You know about it, however, didn't you?

A. I will say I knew about it.

Q. Yes. And the same charges were made when he was brought over here, that it was an outrage to cite the poor settler for contempt that you have made at this time, were they not?

A. Oh, I think it is, Mr. Treadwell. I think it is perfectly ridiculous.

Q. Well, you think so, and you said so at that time, didn't you?

A. Yes.

Q. Notwithstanding the Judge held he was in contempt, you still think so? That is right, isn't it?

A. Well, I feel that question as a man that lives down there in the country, I feel that.

Q. Yes, I understand. It was after that and after he told you that he had been enjoined from maintaining that dam that you made a change of some hay or something of that kind, and bought it from him? Is that what I understand you to mean?

A. Yes.

Q. Now, if Mr. Young testified in this court when he was over here on the contempt matter, that he built that, and that you had an interest in it before that, it is not so at all, is it?

A. I wouldn't say so. I wouldn't say so.

Q. That was the first interest you got in it, when you bought it at this time from him?

(Testimony of W. D. Hanley.)

A. Well, that was the first time I got all the interest in it, I would say that originally there was a ditch running cater-cornering across bearing south across 29. Mr. Young had it under lease at that time.

Q. Well, now, let us come to that. Take this old Young dam. That was down the river quite a ways below the present one, was it not?

A. Yes, some.

Q. You say there was something built in the bottom of that. How high a plank was put in the bottom of it?

A. Well, I wouldn't go into technical detail as to the old dam, but I know that the old dam, the bottom of it was above the bottom of the river.

Q. Well, about how much? How high a plank do you say was put in there?

A. Well, I would say that it takes practically a foot to make a good showing that it is higher. Say a foot.

Q. Now, isn't it a fact, Mr. Hanley, that several years ago we came into this court and charged that Mr. Young was taking out more water than he needed for the land that he was permitted to irrigate by this decree, and that he did it so as to force it over onto your Section 29 and give you the benefit of it, which was not entitled to it; and didn't you in this court swear that you never got any of that water, and that that was all false? Didn't you so testify, Mr. Hanley?

A. Well, you say I did.

Q. Well, didn't you?

A. Well, I would like to see the record.

(Testimony of W. D. Hanley.)

Q. You wouldn't be able, then, to state whether you did so testify or didn't so testify until you saw the record? Is that correct?

A. Yes.

COURT: Is the bottom of the old dam there now so you can tell?

A. Well, I haven't been down to it lately. I wouldn't say whether it were or not, Judge, but there is evidently signs there that it is easy to tell where water runs.

Q. You stated, Mr. Hanley, as I understood you, that you went to the Young dam a few days ago. Is that so?

A. Yes.

Q. Did you look at the river below that dam?

A. Yes.

Q. Did you notice how far the river was below the banks at that point?

A. Why, yes, in a general way. I didn't meter it.

Q. Well, how far was the water below the banks?

A. Above or below the dam.

Q. Below the dam.

A. Oh, I should judge three and a half feet, maybe, four feet.

Q. Below the banks of the river?

A. Yes.

Q. That is about right?

A. I would say probably about three feet above, may be.

(Testimony of W. D. Hanley.)

Q. Three feet below the banks?

A. Yes.

Q. So when you stated to the court that the river was bank full, you were evidently thinking about the condition down on your land, and not at the Young dam? That is correct, is it?

A. Well, I didn't say that the river, that any water was running over the banks at the Young dam.

Q. No, but you did say that you went to the Young dam, and that the dam was having absolutely no effect on throwing the water out through the ditch, because the river was bank full anyhow, didn't you. Didn't you state that to the Judge?

A. Mr. Treadwell, the ditch there, or the bank of the river there, probably is three feet higher. I didn't go up and examine the Hotchkiss ditch. I didn't examine the Hotchkiss ditch, but I would say that a ditch in there and onto that road would draw the water out of that river above the dam.

Q. The one above the dam?

A. Yes.

Q. When the dam is there?

A. Yes.

Q. And the higher you raise that dam, the more water it puts out then, doesn't it?

A. Yes.

Q. And the sooner it will put water out, too.

A. Yes.

Q. So that the dam is a very material proposition in putting water out there, isn't it?

(Testimony of W. D. Hanley.)

A. Well, I don't think it makes much difference if a fellow doesn't take it out.

Q. You don't think it makes much difference if he don't take it out?

A. No.

Q. At the time you were there, he wasn't taking it out? Is that the condition, or not? Or was he still taking it out, notwithstanding we have brought this contempt proceeding?

A. I didn't examine the Hotchkiss ditch. There was water in the road at the Hotchkiss place.

Q. On both sides of it?

A. Both sides of it. If there were water on one side, there would have to be on the other. There is a culvert through there,—it would level up.

Q. So he was taking water out, as far as you know?

A. Well, the water may have come from some other place.

Q. Well, now, come back to what I am asking you. I am asking you, didn't you tell the court that the dam could not have any effect because the river was running bank full there anyhow, and it couldn't make any difference? Didn't you so testify in answer to Mr. Wood?

A. Why, you could take water out on the east side.

Q. Just answer that question yes or no, please.

COURT: Do you remember whether you did or not?

A. No. I don't want to be understood in saying that the water was running over the banks of the river

(Testimony of W. D. Hanley.)

at the Young dam. I don't want to be understood as saying it was running over the banks at the Young dam, or was up to the tops of the banks.

Q. Now, as I understand it, this statement in your affidavit is entirely unfounded where you state that until yesterday, the 29th of April, 1915, when the complaint was served upon you in Portland, Oregon, you had no knowledge of the George W. Young contempt proceeding, or that he had been ordered to remove said dam, or purge himself of contempt by paying costs? That is not so at all, is it, that portion of your affidavit?

A. It is not so.

Q. No, I say that is not true there? You don't contend it to be, do you?

A. I want to be understood as saying that I did understand that Young was held for contempt of court.

Q. I just want to get the record clear. You state now that that is not right?

COURT: I understand now you made a mistake in that affidavit.

A. Yes, sir; in the allegation, I didn't aim to say that I had no knowledge of the Young contempt.

Q. Now, Mr. Hanley, you have a tenant on 29, haven't you?

A. Yes.

Q. He is growing grain, is he not?

A. Yes.

Q. It is true that you told me that you told him to use the Young dam to get water over there?

A. Yes.

(Testimony of W. D. Hanley.)

Q. So that when you stated here in the affidavit that you hadn't used it, and you hadn't incited anybody to use it, and you didn't know it had been used this year—

A. Well, it hadn't been, Mr. Treadwell. It hasn't been.

Q. You told him to go and get it, but he wasn't able to get it. Is that the idea?

A. Oh, no. He doesn't need water now. He probably won't need water for a month. He has got plenty of water for the present. All that he will need will be just a little bit of water to run under his sod to develop his grain, and that probably won't be for another month that he will want it at all."

* * * * *

"Q. Whom did you get the land from?

COURT: Is that 31?

MR. TREADWELL: Section 5.

A. Section 5. From Mr. Wood. It came through Charles Altschul.

Q. He had got it from the Road Company?

A. Yes.

Q. Got a contract?

A. Yes.

Q. The contract was assigned to you?

A. Yes, to the William Hanley Company.

Q. You are president of the William Hanley Company, as I understand?

A. I am a stockholder in the company.

(Testimony of W . D. Hanley.)

Q. You transferred all the property that you owned at the time of this decree, that is described in the decree, to the William Hanley Company, did you not?

A. It is the successor, the William Hanley Company. I think it was in another company first. I think that the William Hanley Company is the final successor of it. There is another transfer in there."

* * * * *

"Q. Now, Mr. Hanley, you stated in your direct examination that on the east fork all the water had to be taken out of the river, before it got down to the channel between 34 and 35. What did you mean by that?

A. Why, do you have reference to the water in 27 and the drain ditch?

Q. Yes, sir.

A. The drain ditch gate is operated to reduce the quantity of water in the river, and it was built for that purpose, of reducing the quantity in the river, and taking it away. The river itself was the distributing system of irrigation.

Q. So your object has been, by one method or another, to take all the water out of the river before it gets down to the channel between 34 and 35?

A. Why, now, Mr. Treadwell, I wouldn't want to say to the court here on this proceeding that I have looked technically and carefully after the drain ditch as to all periods and all conditions; but my general instruction has been, and you people were a party to help construct that ditch, and you never have made any com-

(Testimony of W . D. Hanley.)

plaint to me on the ground—I never know of anything only when it comes into court—as Mr. Newman says that he worked up there and put in some boards, or took out some boards; and if that hadn't been used satisfactorily to you, I know it is your own fault. The other time you brought me in here because I left it open. This time you bring me in here because I shut it up.

Q. Well, now, when did we bring you in here because you shut it up, Mr. Hanley?

A. Right now.

Q. Right now?

A. Right now. And I took you out there and showed you that I did shut it up.

Q. As I understand your testimony, then, your understanding is that we are charging you in this proceeding with shutting up the drain ditch?

A. The drain ditch.

Q. That is your understanding of this proceeding?

A. That is my understanding of one of the many things you are charging me with.

Q. The affidavit complains that you had the drain ditch open diverting something like 40 feet of water during March and the great part of April. Do you know that?

A. Now, Mr. Treadwell—

Q. Do you know it, or don't you?

A. I don't know it. I know what my orders were.

Q. I suppose then, you haven't read the affidavit of contempt in this matter, on which the contempt is based?

(Testimony of W . D. Hanley.)

A. Yes, I have read it over.

Q. You say you don't know that that affidavit charges you with having the drain ditch open during the month of March and April, and that you thereby diverted away from the river, something like 40 feet of water?

A. Well, that affidavit is a mistake, Mr. Treadwell. It is not true.

Q. That affidavit is a mistake?

A. It is not true.

Q. So you say what we are charging you with here is closing the drain ditch, do you?

A. One of the things.

Q. Now, Mr. Hanley, let us take up just a moment this matter of making objections to you. You know, do you not, Mr. Hanley, that after this decree was entered, we brought here what was known as a supplemental case in which we alleged that you continuously, in violation of that decree, allowed the head of the drain ditch to be opened, that you took the water out at high stages of the water when we needed it for irrigation; that you took it out at low stages of the water, when we needed it for stock; and you know that that case was tried, don't you? Don't you know that, Mr. Hanley?

A. Certainly.

Q. Didn't you testify in it?

A. Sure.

Q. And didn't it go through this court?

A. Yes, sir.

(Testimony of W . D. Hanley.)

Q. And didn't it go to the Circuit Court of Appeals?

A. Yes, sir.

Q. And hasn't it come back, and a new judgment entered again enjoining you from doing that?

A. Not from using the drain ditch for the purpose for which it was constructed.

Q. We will come to that. But you know we had objected to your use in the way you used that drain ditch, and the way you claimed you have a right to use it for years and years since this decree has been entered, and have had you in court all the time on it, do you not?

MR. WEBSTER: Wait a moment. Part of that is all right. But his assumption that Mr. Hanley objects to the way they have a right to use it.

MR. TREADWELL: I say we object to it.

MR. WEBSTER: That you object to our use.

MR. TREADWELL: The way he claimed to use it. You understand the question, do you not, Mr. Hanley?

A. Yes, I do.

Q. Will you answer it, whether you know we have objected or whether we haven't?

A. No, I don't know what you have objected to it, Mr. Treadwell. I sat beside of you and you won't tell me what you object to. The only thing I can get is what I am getting now. I don't know what you object to.

(Testimony of W . D. Hanley.)

Q. So you haven't yet got any idea that we object to your taking water through that drain ditch out of the river at a time when we need it for irrigation, and at a time we need it for watering stock? You don't know we make that objection?

A. Mr. Treadwell, I say to you now, and I say to you in open court,—I said to you when I was riding with you—I have cried it from the hilltops—that if there is anything to settle this detail of operating these little few acres that we are irrigating, all right. Now, the thing that is between us, it is fair to tell it to the court, I want to irrigate the balance of the country, I want to save that surplus water. I know you want it down there in that tule bed.

Q. Now, Mr. Hanley, you say that you took eleven people, I think, to look at your land in Section 27, in the neighborhood of the Orphan ditch. When did you do that?

A. How many?

Q. I thought you said eleven witnesses. I may have misunderstood you.

A. No, I didn't say that. I went down there the evening before I came here, with Mr. Pirie and Mr. Houser.

Q. What was the date, then?

A. That was Saturday afternoon.

Q. That would be Saturday, the 8th. Now, did you go there with people before that?

A. Yes, I went back there, I think Tuesday, Mr.

(Testimony of W. D. Hanley.)

Treadwell, after you and I were there, and the boards were out of the Orphan headgate.

Q. That would be Tuesday, May 4th, you mean?

A. The day after you and I were there that Sunday.

Q. I don't mean that. That was sometime before that?

A. Yes.

Q. I mean when you went back from here, did you go down there before you took the people down there on the 8th?

A. No, I hadn't been back down there again. I had been back down again after you and I were there.

Q. Yes, well, what is the date of that? That is the date I want to get.

A. That was Tuesday, I think, following the Sunday that you and I were there.

Q. Yes.

A. And the Orphan headgate was open then, and a couple of your men were there.

Q. I don't mean that. I was talking about the time after you left Portland the last time, and went back there, the 8th was the only time you went down there, do I understand, with people?

A. Yes.

Q. Now, you had 27 all flooded at that time, did you not?

A. Yes, sir.

Q. And that had been flooded by putting in the boards in the 21 dam, hadn't it?

(Testimony of W. D. Hanley.)

A. No, sir.

Q. It had not?

A. No, sir.

Q. The 21 dam had been in on the 4th, hadn't it?

A. Yes, sir.

Q. Have you seen the pictures here of the flooding of the whole of your land there by that dam?

A. By which dam?

Q. The 21 dam, after you put it in on the 4th?

A. No, I have not.

Q. Now, Mr. Hanley, don't you know that along, say, in the neighborhood of the 4th of May, your Section 27 before those boards in the dam were put in, had all been drained off? There was no water standing on it at all?

A. Why, it would have had water on, Mr. Treadwell, if I should have taken out, or rather taken out the manure dam, in the head of the 21 ditch.

Q. Very well; but as a matter of fact, it had been drained off, when Mr. Gilchrist and Mr. Newman were down there, around prior to the 4th of May; that is a fact, is it not?

A. It was dry.

Q. Yes, it was dry?

A. Yes.

Q. Then you went and put this water on there, and then took these men down there to look at it. Is that a fact?

A. At what date, Mr. Treadwell?

(Testimony of W. D. Hanley.)

Q. You took them down on the 8th, and you found it absolutely submerged with water, didn't you?

A. 21?

Q. Yes.

A. Yes, 21 was covered with water.

Q. And it had been all drained off?

MR. WEBSTER: 21?

Q. 27, I am talking about.

MR. WOOD: He has been talking about 21 all the time.

A. After the boards were put in the dam, in the 21 dam, we had taken all of the water out of the river, and turned it onto 21.

Q. That went on down to 27?

MR. WEBSTER: No.

MR. TREADWELL: Where else can it go? It can't go anywhere else, can it?

A. We were not intending to leave it on there any longer than to fill up the ground.

Q. To fill up the ground? And you found it filled up down there about how deep when you took your witnesses down there to look at it, to show them the conditions.

A. On 27?

Q. Yes.

A. It was filled up with the water that had run off 27, and the water that was backed up by the levee that had not got off or would not get off till it evaporated, and went off very slowly.

(Testimony of W. D. Hanley.)

Q. But it had once before that entirely drained off 27, hadn't it, into the Orphan ditch?

A. No, sir. No, it has not been drained off.

Q. Didn't you say awhile ago, that it had been drained off?

MR. WOOD: No, he didn't. He was talking about 21. You never said 27 once, and the record will show it.

COURT: How does the water get onto 27?

A. The water gets onto 27, principally from the overflow from the banks of the river.

COURT: How far above 21, or right at 27?

A. Right through 27.

Q. Just above the drain ditch?

A. It runs out all along the line of the bank, of the top of the bank all the way through 27, the water.

COURT: Now, that is the way the water gets onto 27 and not from the banks higher up above 27?

A. No, not this year.

Q. Now, Mr. Hanley, just what you are saying to the Judge, now, is that it has not overflowed the banks above there this year, but when you put in the 21 dam, and turn the water out from the 21 dam onto Section 21, that water goes down onto 27, does it not?

A. Probably a small part of it, Mr. Treadwell.

Q. It cannot get away in any way on that side of the river, after it goes onto 21 except by going down onto 27, does it?

A. Oh, yes, it goes down —

(Testimony of W. D. Hanley.)

COURT: Let me understand. When the 21 dam is closed, the water goes out on the east side.

MR. TREADWELL: On both sides.

COURT: Does it go out on this side?

A. Yes.

COURT: Very well. I didn't understand that. I notice the ditch, the Hanley ditch runs out on the east half.

MR. TREADWELL: Another one.

COURT: Oh, this is another one?

A. This is the real 21 ditch. They confuse the record by calling this the 21 ditch.

MR. WEBSTER: By this you mean the east?

A. The east ditch. That is known as the Hanley upper ditch. This is the 21 ditch.

COURT: Very well. I understand it now. I wondered how that water got in.

Q. Now, Mr. Hanley, with your dam at 21, you irrigate all that land in Section 21, between the ditch that you have just referred to to the court as the 21 ditch, and the river, do you not?

A. Why now, the big majority of that water, altogether the big majority of it, goes over 28, and down onto 33.

Q. Can't you answer that question, Mr. Hanley? It seems to be a simple question?

A. No, it doesn't.

Q. You don't irrigate that land at all then?

(Testimony of W. D. Hanley.)

A. Oh, yes.

Q. Don't you irrigate it by the water you turn out of the river by the 21 dam?

A. Partially so.

Q. And that water runs right down to Section 27, doesn't it?

A. A portion of it; a small portion.

Q. The water between that ditch and the river has all to run onto 27, hasn't it? Just look at the map and see if it could run anywhere else than onto 27?

A. Why, yes, onto 28.

Q. It would have to get over to the other side of the ditch to do that, wouldn't it?

COURT: He is talking about the water getting out on the east side of the ditch.

Q. Between the ditch and the river.

COURT: Answer that question. Here is the ditch running down here. He has reference to the water that gets out over the east side of that ditch.

A. This ditch is not very well kept up. If any water got out, on this side of the ditch, it would irrigate these little strips along here.

Q. How do you irrigate this land between the ditch and the river?

A. Out of this river.

Q. Out of the river?

A. Yes.

Q. And the 21 dam helps the water to go out of the river, doesn't it?

(Testimony of W. D. Hanley.)

A. The drain ditch regulates the river there.

Q. So the 21 dam is not used to put any water out of the river at all, I suppose, Mr. Hanley?

A. Not till after the 5th of May.

Q. Not till after the 5th of May?

A. Yes.

Q. Well, whenever it is used,—I don't care whether it is the 5th of May, or any other time—it is for the purpose of putting the water out of the banks, and out of the river, isn't it?

A. Yes.

Q. That is what it does, isn't it?

A. Yes.

Q. You say now, Mr. Hanley, that there were certain cuts along the river through your property, but that they were all in repair? What do you mean by them being all in repair?

A. That they were kept filled up—those breaks in the river.

Q. How did you keep those breaks filled up, Mr. Hanley?

A. Well, we have had a man working along the river this season to specially look after them.

Q. What is the method, I mean, by which you close those cuts?

A. Why, they have some of them, I see, apparently have been filled up with boards and manure put up against them.

Q. You have seen this picture here that has been,

(Testimony of W. D. Hanley.)

I think, referred to as Exhibit 15. Is that typical of the way those cuts are regulated?

A. Well, that is a very much exaggerated picture, Mr. Treadwell. There is only a little bit of water going around each edge of this, and it has went out here, and lays on the ground, and it is more an exaggerated picture I will say that if there was a personal examination there, the court would find that the water there is much higher in the river than it is outside. And these little places that is broke around is just places broke around. The river down there is a great muskrat country —

Q. What I am getting at, Mr. Hanley,—excuse me for stopping you; I want to draw your examination to a close,—I am just asking you if that is a fair representation of the general method by which those cuts are controlled on your property?

A. No, it is not. That is only an emergency method.

Q. You have a better method than that, I understand?

A. They have been filled with scrapers.

Q. Yes, I understand.

A. This is only an emergency in the wet time.

Q. How many of those are there on your property?

A. Well, I wouldn't say, Mr. Treadwell; only going back on my memory when I first came into the country, but I would say that probably there were as many as eight or nine on the east side of the river, and there was a very very large one at the place in the Nelson place, that was up in 22; in the original times, and on

(Testimony of W . D. Hanley.)

down, the big breaks were on the east side. The country leans east. The grade of the country is east. And there were probably half as many on the west side, or maybe as many, but they were smaller.

Q. Now, Mr. Hanley, you state that you take the water out at the drain ditch for the purpose of preventing it from overflowing your land in 35. Is that as I understand you?

A. Not from overflowing it, Mr. Treadwell, but to regulate it.

Q. Well, to regulate the amount of overflow.

A. The amount of water that the land can take care of.

Q. It would be a damage, then, I suppose, to you, to let it go down there? That is the reason you take it out at the drain ditch?

A. That country, including —

Q. Just try to answer the question, Mr. Hanley. I want to get along. Is it, or isn't it?

A. It is a damage.

Q. Still, if it goes on down and the company takes it out at the Orphan gate, then that is a damage to you, too? That is your idea?

A. It certainly is a damage to me.

Q. The right that you claim is to take the water away before it gets to your land, so it won't overflow it, or so as to regulate the overflow, and still, if you want it to go down there, to insist it shall go down there and overflow. That is your position, is it?

A. I said to you that day, Mr. Treadwell —

(Testimony of W. D. Hanley.)

Q. Never mind; is that your position, or isn't it?

COURT: Just state your position.

A. Yes.

Q. Isn't it a fact, Mr. Hanley, that when the Pacific Live Stock Company did improve the smaller part of the channel that is on their property, at the lower end of 34, you objected to them cleaning that channel, out, and said that by doing that, it prevented the water from overflowing your land?

A. Now, Mr. Treadwell —

Q. Well, did you so state?

A. Yes, I did.

Q. You so testify in the record?

A. Yes, sir, I did.

Q. Have you got that letter where I offered, on behalf of the Pacific Live Stock Company, to join with you in constructing that channel down between those two sections, and in which I also agreed that if that cost you any additional expense in getting your water onto Section 34, that we would share with you the expense of getting it there from the 21 ditch?

COURT: You mean 35?

MR. TREADWELL: 35, yes. I beg your Honor's pardon.

Q. You have that letter?

A. No, sir.

Q. Isn't it a fact that letter has remained unanswered for something like a year and a half or two years by you, Mr. Hanley?

(Testimony of W. D. Hanley.)

A. I don't think I ever had such a letter, Mr. Treadwell.

Q. Well, if you haven't, and Judge Webster has it, I would like to have it. I asked for it last night. I thought I sent it to you, and sent a copy to Judge Webster.

MR. WEBSTER: I haven't any recollection of such a letter, but I will look through my files. What time was it?

MR. TREADWELL: I think it was about a year and a half ago.

Q. Isn't it a fact, Mr. Hanley, that the Pacific Live Stock Company, through myself, has offered to join with you in constructing a river channel between Section 34 and Section 35?

A. Mr. Treadwell, you didn't do it the day we stood there, and I told you that that was the work that should be done.

Q. I am not going to get into any dispute with you, Mr. Hanley, as to our oral conversation, when I have got the matter in writing with you. Don't you know I have got the matter in writing to join with you in constructing that channel?

A. No, you never have, Mr. Treadwell.

MR. TREADWELL: I ask for the production of that letter.

MR. WOOD: Apparently no one ever got such a letter. Haven't you a copy?

MR. TREADWELL: Surely, I have a copy in

(Testimony of W . D. Hanley.)

San Francisco, but the communication is rather interrupted between those points.

MR. WOOD: Judge Webster says he doesn't recollect it. Mr. Hanley says he never heard of it.

A. If there is any misunderstanding about it, I will say now that I am willing to construct such a channel with perfect understanding of protecting my rights.

Q. Yes, I understand your rights, of course. You will state what you think they are, and if we don't agree with you, that ends the matter, doesn't it?

A. Oh, I don't know, Mr. Treadwell.

The following telegram was furnished later:

“San Francisco, Calif., May 12, 1915.

Mr. Edward F. Treadwell:

Care Clerk U. S. District Court, Portland, Ore.

Part letter October twenty sixth nineteen twelve to Webster as follows: ‘We would therefore be willing to arrange that a ditch might be connected with the twenty one ditch, bringing water down to Section thirty four and as this would be made necessary by reason of the changed channel it would only be proper that we should stand half of the cost of this ditch, as well as the new channel. The water could readily be flumed over or siphoned under the drain ditch. If this arrangement meets with the approval of Mr. Hanley, the work could be done and the plans prepared by an engineer agreed upon, by the parties, or we could each appoint an engineer and have them work out the plans together.’ Delger Trowbridge.”

(Testimony of W. D. Hanley.)

Q. You testified about the water that you divert through the drain ditch, etc., going into Embree Slough. Have you got any dams in Embree Slough at the present time, Mr. Hanley, the various branches of it?

A. Are you referring to 23?

Q. 23?

A. Yes, Section 23.

Q. Well, my knowledge of the sections is not very clear.

COURT: Embree Slough is what takes up the water from the drain ditch, isn't it?

A. No, from both of the ditches—from the Hanley upper ditch and the drain ditch, too, both of them.

Q. Those are above the drain ditch, those dams that you have in Embree Slough, are they?

A. I have no dams in Embree Slough.

Q. At any place?

A. No, sir.

Q. Not in Section 23, or anywhere else?

A. There is a gate—there is a stop gate on 23, in the ditch right at this turn. This is not a correct map.

MR. WEBSTER: This has not got the extensions on there?

A. This is not a correct map.

MR. TREADWELL: I will withdraw that.

A. This ditch comes out around like this?

Q. Yes, that was not made at that time.

A. And this gate is somewhere at a point about here on 23, in the dug ditch.

(Testimony of W. D. Hanley.)

COURT: The northeast quarter of 23?

A. Yes.

MR. WEBSTER: This map does not show the ditches as they are now. That is an old map.

MR. WOOD: I would like to ask counsel and his client in the record here, whether he objects to Mr. Hanley filling the gaps in the river bank and keeping the bank in repair?

MR. TREADWELL: I object to him opening them.

MR. WOOD: That is not my question.

MR. TREADWELL: Of course we do not object to his closing those banks. We want them closed. That is what we are objecting to in this proceeding, that they were not closed, and they should have been.

MR. WOOD: Do you claim it is his duty to go and close them, if they are natural openings in the bank of the river?

MR. TREADWELL: I am not arguing this question now. My position will be very clear when we come to argue it.

REDIRECT EXAMINATION.

Q. I do not know how it is with others, Mr. Hanley, but I am a little confused myself about this drain ditch matter. Mr. Treadwell asked you whether you knew that the affidavit complained that in March and April you kept the drain ditch open, and diverted the

(Testimony of W. D. Hanley.)

water in March and April away from them, and then you said your understanding was that the complaint was that you kept the drain ditch closed. Have you got that information, that affidavit? My understanding is that that makes both of the points, what Mr. Treadwell said, and also what you said.

MR. TREADWELL: Well, if you can find it, you are a wonder.

Q. The first part of this information directly against you is that during the months of March and April it was unnecessary to drain water from the land of the defendant Hanley, but on the contrary, the same was the irrigation season, during which the defendant William Hanley was attempting to put water on his land for irrigation thereof, and notwithstanding the terms of the decree, for a long period in the months of March and April, had the head of the drain ditch open. Now, as to that, did you have the drain ditch open at any time in March and April, when it was not necessary for the drainage of your land, and the regulation of the river, to keep it from being overflowed?

A. I would testify by order that the drain ditch was closed, as early as it could be closed, so to be permitted by the ice and the winter conditions, that it was closed and that the gate was a new gate, reconstructed last year. And I went so far as to say "Don't depend on the boards. Go and haul some stack bottom, or something, and put in there." So that that ditch, that gate, is absolutely closed?

Q. Now, the complaint against you further is, as I

(Testimony of W. D. Hanley.)

understand by Mr. Treadwell, that you flooded your Section 27 by putting in the boards into 21 dam, and having flooded it, you then called witness' attention to the fact. I want to ask you whether or not 27 was flooded with water at any time prior to May 4th, when the boards of the 21 dam were in?

A. 27 has been over-flooded all spring, both by the amount of water that was going onto it, and the levee that is constructed on the north side of 34 by the company.

Q. Would it have been a relief against that flooding or over-flooding of 27, for you to have opened the drain ditch and relieved the river in that way?

A. Oh, it would have relieved it.

Q. So that is what you mean that they complained both ways?

A. Both ways.

Q. I don't know whether the Court clearly understands the office and purpose of this drain ditch.

COURT: Yes, I think I understand that. He has already defined it during his testimony. It is to regulate the flood waters, as I understand.

A. In the river.

COURT: Yes, in the river.

A. Yes.

MR. WEBSTER: Well, that is true, and yet it is not the whole truth. I didn't hear the evidence, and of course I am not in a position to say, but I would like to have this court get this regulation of this ditch, as to

(Testimony of W. D. Hanley.)

what its actual purpose is. Now, to say that it is for the purpose of lowering the water in the river is not to give the real purpose of this ditch. That water overflows Section 35 when the drain ditch is closed. That is the irrigation of Section 35, and it stands there until that section is irrigated. Now, by opening the drain ditch, it draws the water out of the river. The water from Section 35 flows out into the river and out from the drain ditch, and it takes the water off 35. That is the situation.

COURT: He has been over that feature. I don't think it is necessary to go over that again. I want to ask some questions about it myself before you get through.

MR. WOOD: Would your Honor just as lief ask it here? I want to get the subject together as much as possible.

COURT: I want to know, Mr. Hanley, was it intended that that drain ditch should be used for regulation of the waters of the river at any time prior to the 5th or 12th of May?

A. The drain ditch is to be operated any time that it is needed.

COURT: Is that the decree? Is that the purpose of the decree?

MR. WOOD: Yes, your Honor.

A. That is my understanding of the decree. It is operated any time that it is needed for draining purposes.

COURT: I got the impression that the Pacific Live Stock Company were to have the waters prior to

(Testimony of W. D. Hanley.)

May 5th, all that would come down to them, so that their lands should be watered; if the water was sufficient, the surface water, for surface irrigation. Now, then, if the drain ditch is used to conduct the water away from the natural course of the water otherwise, it would not go down onto their lands, and I want to get at the real purpose of the decree as to when that drain ditch should be used.

MR. WOOD: I think, your Honor, it could be stated by agreement of counsel. It is substantially this: They are to have all the water prior to these dates, except that Hanley is to have the privilege to protect himself against overflowing—over watering. Is that your understanding?

MR. TREADWELL: Not at all, your Honor. I would say I think it is perfectly proper for you to get Mr. Hanley's idea, if that is what your Honor wants.

COURT: That is what I want.

MR. TREADWELL: Whether that is our idea, or not, of course would be an entirely different proposition. We contend that this matter is fully covered by the adjudication of this court, and what Mr. Hanley says is the purpose, of course, is not binding upon us. We are perfectly willing he should give it to help the court.

COURT: I understand your idea of the matter is that you can use that drain ditch at any time you desire, notwithstanding the conditions down below, for the protection of yourself by overflowing on Section 35.

A. And 27.

(Testimony of W. D. Hanley.)

Q. And 27.

A. Yes, any time.

COURT: I think that is clear.

MR. WOOD: Here is their information: "That in and by the terms of the said decree, the said defendant Wililam Hanley was enjoined and restrained from using a certain ditch, except for the purpose of draining water from the surface of his land; that during the months of March and April, 1915, it was unnecessary to drain water from the said land of the defendant." There is no limitation of time—whenever it is necessary to do it. However, as you say, everybody agrees that the decree speaks for itself.

A. This ditch was dug in 1893, and this gate was put into it and it was operated up till the time that this controversy started without any questions being raised about it.

COURT: You have reference to the drain ditch?

A. The drain ditch. The water that goes out from the drain ditch goes into the Embree Slough, and down onto the company's land.

COURT: You say that goes onto the company's land. It has got to go back into the stream again, and then re-directed from that.

A. Yes, back in the re-formed channel.

COURT: I understand that the banks are higher than the surrounding territory.

A. It goes into Embree Slough.

(Testimony of W. D. Hanley.)

COURT: Does Embree Slough run into the channel of the stream?

A. Yes, sir. Yes, below.

COURT: There is an opening for that to flow into?

A. Yes, and the slough banks is lower—it catches the water that gets away from the channel.

COURT: Do you say then that all of the water that you divert up there, finds its way down onto this land below?

A. Yes, sir.

MR. WEBSTER: Through 27, does your Honor mean?

COURT: Diverted by the drain ditch.

MR. WEBSTER: Yes, it all goes back onto the company's land.

COURT: Isn't there any waste through there by absorption, etc., and by evaporation?

A. They use it for an irrigation on their Section 36, and the southwest quarter of 26.

COURT: That is a very small tract of land, as compared with what they have below.

A. Then it goes right on into the Embree Slough.

RECROSS EXAMINATION.

Q. Now, Mr. Hanley, the first dam that the company has where it can take the water out of the channel of the river itself is known as the Mace dam, is it not?

(Testimony of W. D. Hanley.)

A. Well, that is on the re-forming of the slough, out of 34.

Q. Yes. What we are talking about is the river channel after it leaves 34.

A. Well, that is the re-forming of that slough there, which is at the Mace land.

Q. You are beginning to call the river channel a slough, are you?

A. It is a slough.

COURT: That Mace dam is in Section 2?

A. Yes.

Q. This water you take out through the drain ditch goes miles below that before it comes back into the river, doesn't it?

A. No, it does not go miles, Mr. Treadwell.

Q. How far below that point does the Embree Slough come back to the river?

A. About three miles.

Q. Three miles, yes.

COURT: Below the Mace dam?

A. Yes. I would not say three miles below Mace's dam. What I had more reference to is three miles from where it started, through there.

COURT: I think you have gone far enough with that. What do you want to ask?

REDIRECT EXAMINATION.

Q. I have always felt that "drain ditch" is a misnomer. I want to bring that point out. Now, Mr.

(Testimony of W. D. Hanley.)

Hanley, is there any obligation on your part to keep this ditch open and drain it, or is it for your benefit and privilege?

A. Why, so far as this drain ditch is concerned, it is clearly out of repair. It doesn't take but little water. The company has refused by neglect to keep it open throughout the—

COURT: Upon whom is it *incumbernt* to keep that head of that drain ditch regulated?

A. It doesn't seem to—myself to operate it—to operate it at the head.

COURT: Well, that answers the question.

MR. WOOD: Well, not quite.

Q. My point is this: Is that drain ditch intended to absolutely drain the land dry, or is it intended to regulate the amount of water that you let go on?

A. To regulate the amount of water that goes onto it.

Q. Well, then, if you let a certain amount of water go onto 35, we will say, before you drain it off, it forms a part of the irrigation system.

A. It does, yes, the distributing system, a very important part of it.

Q. And you have the right to let as much water stay on, or take as much water off as you see fit.

MR. TREADWELL: Of course this is all understood, that we are not bound by his conclusions.

COURT: Oh, of course, I understand that. We are trying to get at the situation, is all.

(Testimony of W. D. Hanley.)

Q. You have the right to let as much stay on, or take as much water off, as you see fit?

A. That is my understanding.

Q. In other words, the country when you went down there, down to 35, was swamp, and to reclaim it, you built this drain ditch, but you don't want to take all the water off, but you want enough to make hay?

A. Yes. We have changed the lands in the vicinity of its operation from tules and flags, to actual hay land, and very good quality.

Q. Now, suppose the company came forward and said: "Mr. Hanley, we relieve you of all obligation about this drain ditch, and we will put in such a gate at the Orphan Headgate, as will take out all of the water, and you will not be bothered with any flooding," would that satisfy you, or do you want some of the water on 35?

A. I want the use of the water on 35.

COURT: Do you remember when the Orphan's Headgate was built, when that ditch was built?

A. In 1893.

COURT: About the same time the other was built then, about the same time the drain ditch was built?

A. Oh, the Orphan Headgate?

COURT: Yes.

A. Oh, the Orphan Headgate was only put in at the time of the contempt proceedings before Judge Bellinger. It was a controversy then with the settlers that owned the land west of us.

(Testimony of W. D. Hanley.)

COURT: Well, I think that was testified to. I didn't know but what you would recall it.

A. The Orphan Headgate has only been in, I would say, the last three years, or four years, as it is now operated—as it is now—only since the company owned the land.

Q. Mr. Hanley, do you know how long the boards were in the 21 dam on the 4th of May?

A. No, I am not prepared to testify on that. The only knowledge I had of it was when I came from my house across facing 21, and seen the gulls on 21.

Q. If you don't know, never mind. I think, though, there is some testimony here on the part of the other side. I think maybe by Mr. Gilchrist,—no, I am mistaken about that; he said he saw them in the afternoon. Well, then, assuming that the boards were in from nine o'clock to two, or something like that, would the effect of those boards being in the 21 dam flood Section 27, down above their 34?

A. No, the water would go on to 21, and across into 28, with the exception of a small per cent of it going in on 27.

Q. And that would be true, no matter how long the boards were in?

A. Yes, that would be true.

Q. Would it, in your opinion, from your knowledge of the country there, be possible to get the water on 27 that was on it, by putting the boards in this dam for one day?

A. There was no water got to 27 on that day.

(Testimony of W. D. Hanley.)

Q. No, but I say, would it be possible, by closing the 21 dam for one day, would it be possible to flood 27, the way it was?

A. No, sir. 27 was flooded from the river. 27 cannot be very practically irrigated without reconstruction of levees, etc., without using the river channel, as it is higher than the balance of the section. It is just natural irrigation.

Q. You said, in answer to the question of Mr. Treadwell, something like this: He said, "Well, now, when you put the boards in 21 dam, and close the 21 dam, that turns the water out of the river," or something to that effect. I don't know whether it is true, or not, that it turns it out just through the 21 ditch, and the Hanley ditch, or whether it is putting the boards in the 21 dam causes the river to slop over its banks. Now, which is it?

A. We have used the water in a rotating way, so that the order was given on the 5th of May to put the boards in the Hanley upper ditch, and put all of the water out on 21, first thing after they started to use the water.

Q. Still, I didn't make myself clear, or you don't answer my question. Does the 21 dam being closed cause the river to slop over its banks, and aid in irrigation, or does it turn the river out through the ditches only?

A. Why, the water goes out mostly, probably through the depressions, but goes out generally all over the banks.

(Testimony of W. D. Hanley.)

Q. So it goes out, not only through the 21 ditch, and the Hanley upper ditch, but out over the banks as well?

A. Not the Hanley upper ditch. The Hanley upper ditch when the boards were put in the 21 dam, was closed, and all the water that was coming down, went onto 21.

Q. Went out on the 21 ditch?

A. Yes, on the Section 21, on the west side of the river.

Q. What side of the river?

A. West side.

Q. So that there was nothing open on the east side of the river?

A. No, sir.

Q. Well, now, in addition to its going out on the 21 ditch, I understand it put it over the banks of the river as well?

A. Yes, sir.

Q. And that would be on both sides of the river?

A. No, it would only be on the south side. There probably was some went out and ran around, but that would be a small matter.

Q. It would not put anything out below the dam, would it?

A. No, nothing out below the dam.

Q. It would relieve the river below that?

A. No, sir.

Q. You mean the dam would relieve the river below it?

(Testimony of W. D. Hanley.)

A. Yes, sir.

Q. When was this 21 ditch opened this season?

A. Mr. McLaren opened it after I had went up there and looked at the dam in April.

COURT: You say that was opened in April—the 21 ditch?

A. The ditch on 21 that is on the west side of the river. This ditch.

COURT: Well, was the water put into that ditch in April?

A. The water runs into it.

MR. WOOD: That is the point I was just going to bring out. Water runs in there when the dam is all open.

A. It runs out. This land would all have overflowed this spring, if this little manure dam in the head of 21 ditch had been out of it. The banks of the river, 21 is the first place that the river commences to flood on the east fork—natural flood.

MR. WEBSTER: When the dam is open, you mean?

A. When the dam is open.

MR. WOOD: You mean the 21 dam?

A. Yes, the channel flows the water out. It has always been a hay section. I cut hay there in 1882.

Questions by Mr. Webster.

That drain ditch was built by you, and the company, under an agreement to build it, wasn't it?

(Testimony of W. D. Hanley.)

A. Yes, sir.

Q. That was in 1893?

A. In 1893.

Q. And it runs from your land onto theirs, doesn't it?

A. Yes.

Q. And there, you are not under any obligation and never have been, to keep up the end of the drain ditch that is on their land?

A. No, sir.

Q. But only on your own?

A. Yes.

Examination Continued by Mr. Wood.

Q. I want to ask another question to clear this. This water that Mr. Treadwell testified to when he was a witness, which he described as a sea of water over your land, what land was that on?

A. That was on the south end of 27.

Q. And where was it from?

A. From the Orphan Headgate, and the overflow of the river.

Q. It was not your doing at all?

A. No, sir.

Q. Now, have you ever at any time, cut into the banks of the river, to use them as part of your irrigation system, or given any such orders?

COURT: I think he has been over that too.

A. They are natural washes, originally.

(Testimony of George McLaren.)

GEORGE McLAREN

A witness called on behalf of the defendant, William Hanley, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Wood.

Q. Where do you live, Mr. McLaren?

A. Near Burns.

Q. How long have you been out there?

A. 20 years.

Q. Just speak out loud?

A. 20 years.

Q. You have some property of your own—land out there?

A. I have.

Q. How long have you been working for Mr. Hanley?

A. Oh, I have worked for him different times for 25 years—such a matter. I had worked for him before I came there.

Q. You are not one of the regular employes of the ranch, but you work at odd times?

A. No, not at present; not of late years.

Q. Have you had anything to do with the handling of the water on the ranch?

A. Yes, sir.

Q. Regulating the dams?

A. Yes, sir.

(Testimony of George McLaren.)

Q. Has that been somewhat of a speciality of yours?

A. Yes, sir.

Q. Did you ever have charge of, and handle and operate what is known as the 31 dam, called in this proceeding the Luig dam?

A. Yes, sir.

Q. When was that?

A. Why, along about 1901 or 1902.

Q. For how many years?

A. Three or four years. I don't remember which.

Q. Do you know whether you ever paid any particular attention as to any date of the month, when you put the boards in that dam?

A. I did not.

Q. When did you put the boards in from year to year?

A. When I thought it was ready, when we needed the water.

Q. Do you think you ever put them in before the 12th of May or the 5th of May?

A. Some years I think I did.

Q. What is your reason for thinking so?

A. Well the 21 dam could not be put in till the 5th of May, and I would attend to those outside fields first, if they needed water.

Q. Do you mean by that you would put in the 31 dam first?

A. Generally, yes, sir.

Q. How much prior to the 21 dam?

(Testimony of George McLaren.)

A. Oh, it would be about the same time, a few days.

Q. Have you any other means of determining that you would put in the boards in the 31 dam, in the month of April?

MR. TREADWELL: Objected to as leading and suggestive.

COURT: I will overrule the objection. Answer the question.

A. State it again, please.

Q. I say, other than the date of the 21 dam, have you any other means of determining that you put the boards in the 31 dam some times in the month of April?

A. Well, they generally went away about the beef at that time, and I would be alone at the ranch generally; about the 10th or 15th of April they would be gone, and I would commence working with the water then.

Q. Has that 31 dam been used every year in this way, as far as you are concerned, without regard to any particular day of the month?

A. Yes, sir.

Q. Now, you are familiar with the Hanley drain ditch, as it is called—know what it is?

A. Yes, sir.

Q. Did you have anything to do in recent years with repairing the headgate of that ditch?

A. I did.

Q. State when it was.

(Testimony of George McLaren.)

A. Last fall, about October, I rebuilt it, the headgate.

Q. Entirely rebuilt it?

A. Entirely rebuilt it, with the exception of the floor. I left the floor the way it was.

Q. What lumber did you use?

A. New lumber.

Q. From the mill?

A. Yes, sir.

Q. Was there any rock in it?

A. No, sir.

Q. How did you set this into the banks? How were the wings?

A. The wings ran into the bank, extended into the bank about eight feet.

Q. Were the wings water tight—any water go around them?

A. No, sir.

Q. I think you are the one that closed the head of the drain ditch first, didn't you?

A. Yes, I left three boards, put three boards in it, when I finished the headgate last fall.

Q. Well, that was last year?

A. Yes, sir.

Q. Did they remain in till this spring?

A. As far as I know. I was not down there in the winter myself.

Q. Did you state what month you rebuilt it?

A. October.

Q. October of last year?

(Testimony of George McLaren.)

A. Yes.

Q. You left three boards in there, but you don't remember—but you were not back there?

A. No, I was not back there in the winter.

Q. When were you back there?

A. Sometime about the middle of March.

Q. How was it then?

A. Why, I put more boards in it to raise the water up.

Q. What was the purpose in leaving these boards in, and of adding more boards to it? What do you mean, in other words, by raising the water up?

A. I put the boards in to keep the water in the river.

Q. A young gentleman here has testified — Mr. Griffing—that he met you on the Hanley place and had some talk with you about irrigation, or the plan or system of irrigation. Do you remember meeting this young surveyor or engineer?

A. Yes, sir.

Q. About when was it?

A. Why, it must have been some time in March.

Q. Did you meet him more than once?

A. I did meet him once or twice, I think.

Q. On the property?

A. Yes, sir.

Q. Where were those places of meeting?

A. The first time I met him out in 23, at the gate out there, the water gate.

Q. How far from the river?

(Testimony of George McLaren.)

A. Why very near two miles.

Q. Where was the other place?

A. On the bridge across the Hanley upper ditch, near the 21 dam.

Q. How far is that from the river?

A. Oh, 100 yards, maybe, or 100 feet.

Q. Any body present beside you two?

A. Yes, sir.

Q. What was your conversation the first time of meeting?

A. He introduced himself and told me that Mr. Hanley said for me to give him any information I could about the water, where it was going to, and all the outlets, so that he could make measurements on it. As near as I recollect, that was about what we talked about.

COURT: Was that when you were out in Section 23 there?

A. When we was out in Section 23.

Q. Is that about all that you recollect?

A. Why, he asked me where he should go to find the places and where the water went to, and I told him as near as I could.

Q. Well, what was the conversation at the other meeting?

A. I don't recollect we had any very much conversation. He was taking up his water gauges there, and I just asked him about how much water was flowing.

Q. No special conversation.

A. No.

(Testimony of George McLaren.)

Q. Well, now, to refresh your memory—and if I don't state it correctly, I hope counsel will interrupt and correct me—I understood Mr. Griffing to say that in a conversation with you you said to him that you had charge of the irrigating or something to that effect, and that these cuts were made in the bank, and were a part of Hanley's system of irrigation, cutting the banks of the river. Was there any such conversation?

A. Well, I had reference to the ditch that we were standing on—the Hanley upper ditch.

Q. In all the time you have been on the Hanley property, do you know of any occasion where he has cut gaps in the banks of the river, to let the river out, and use it as part of his irrigation?

A. No, sir.

Q. What has been your work and business when you were at work on the ranch, in regard to these banks? What has been your duty?

A. To always keep them in repair.

Q. What has been the method of keeping them in repair?

A. Well, generally every fall we went around with scrapers and fixed any places that were wearing out, or any breaks that come in in the freshets, that were fixed temporarily; we would make them permanent as we could—rebuild levees.

Q. Did you have your attention called to a board in the 21 dam, and some willows lodged in the dam this year?

A. Yes, sir.

(Testimony of George McLaren.)

Q. About when was that?

A. Why, it was some time about the last of March, or last of April.

Q. Who called your attention to it?

A. Mr. Hanley.

Q. Do you remember whether it was at the time that Judge Webster was out there on the water cases?

A. I think Judge Webster went home.

Q. You think he had gone home. The reason I am asking you, I am under the impression that it was earlier than the last of April; but as you cannot fix it, we will let it go at that. Now, state what you found when you went to the dam?

A. I found two or three willows, and some small twigs in there, little small stuff that had lodged in the high water.

Q. Was it obstructing the flow of the river, and raising the level of the river above the dam?

A. Not at all. They were out of the water when I went there.

Q. How many willows were there?

A. Oh, there were two or three willows that was six or seven feet long.

Q. State what labor you did to relieve the situation?

A. Well, I got hold of one, the longest one that was furthest up, and pulled it loose, and they all went away, floated down the river.

Q. Did you see a board there?

A. I did.

(Testimony of George McLaren.)

Q. Where was the board—on what side of the dam?

A. It was on the south side, in the slack water.

Q. In slack water. Where was the current of the river going out?

A. The current all hits the north side of the dam.

Q. And did you take this board out?

A. Why, I pulled it up above the water. It was loose. I pulled it up when I pulled the willow out.

Q. Was it one of the regular boards of the dam, or was it a board that had lodged there?

A. I could not tell.

Q. I believe its dimensions are already in. Now, as to the construction of this dam, is there any permanent board nailed across which is higher than the floor of the dam?

A. On 21?

Q. Yes.

A. No, sir. Do you mean right where the boards are put in?

Q. No, I mean anywhere.

A. I believe there is a two inch plank in front.

COURT: Is that above the floor of the dam?

A. Just nailed onto the floor, to nail the pilings to, that are driven down in the ground.

COURT: Does that impede the water coming through the dam?

A. I don't think it does.

COURT: What is that?

A. No, sir, I don't think it does. I don't see why it should.

(Testimony of George McLaren.)

COURT: There is some evidence that there was a board in there about six inches high, and that that extended above the floor of the dam.

MR. WOOD: That is the board I was asking about, which he took out. I am now talking about a permanent structure of the dam.

COURT: Oh, yes.

Q. When was the last time that you closed the head of the drain ditch?

A. Along about the middle of March, or between the middle and the 20th, I couldn't say for a day. I went down and put the boards in when the ice had gone out of the river, so the boards would stay in, and raised it up as high as I thought was necessary, so as to run out on the banks on both sides.

COURT: That was about the middle of March?

A. Between the middle and the 20th. I put them in and raised it up, and made it overflow on both sides at that time.

Q. How was the ice in the river this season, compared with other seasons?

A. Well, it was a good deal thicker.

CROSS EXAMINATION.

Questions by Mr. Treadwell.

Mr. McLaren, could you state any particular years that you had the actual charge of the Luig dam?

A. I couldn't say right exactly. It was somewhere about 1891, along there.

(Testimony of George McLaren.)

Q. 1901, you mean, don't you?

A. Yes, sir.

Q. Do you know how many years you actually did anything toward putting the boards in the dam?

A. I put them in for three or four years there.

Q. Three or four years. Did you work with Mr. Luig in putting them in?

A. No, sir, I was always alone.

Q. You were always alone?

A. Yes.

Q. You never worked with Mr. Luig at all?

A. No, sir.

Q. How many boards does the drain ditch have altogether when you put all the boards in so as to shut it up?

A. Why, it is about five feet deep; the box is, I believe.

Q. Well, about how many boards did you put in altogether, to shut it up as tight as you can?

A. Oh, it is owing to the size of the boards. It takes about enough to raise it up five feet, it is just owing to the material we have. A 12-inch board would raise it ten inches, if they are on the slant.

Q. What would be your estimate as to the number of boards you have altogether when you have left them all in?

A. Seven or eight.

Q. Seven or eight boards? So you left three boards in in the fall, and when did you put the next boards in, and how many?

(Testimony of George McLaren.)

A. I put them in in March.

Q. How many did you put in the first time?

A. I put in four or five boards. I am not sure which. I put in enough to raise it up to the top of the bank.

Q. Did you put them all in at that time?

A. They were all out at that time when I went to put them in. They raised up and floated away when they floated up.

Q. When you went there, the three that you had had in were not in?

A. No, sir.

Q. So you put those back? Did you put all the rest of them back, or not?

A. I put in enough to raise the water so it would overflow the river on each side.

Q. Well, did you put in all the boards in the head of the drain ditch that you ever put in, or that were necessary to complete the structure?

A. I put in four or five boards.

Q. You put in four or five boards then?

A. Yes.

Q. Did you put any more boards in afterwards?

A. No, sir.

MR. WOOD: I think I misled you. As I understand it, he was only there when he rebuilt it, put in three boards, then he went out in March—they were out—put in four or five more. I don't think he was back. That is my present understanding of it.

A. No, sir, I was not back."

(Testimony of John Ryan.)

JOHN RYAN

A witness for the defendant William Hanley, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Wood:

“Mr. Ryan, where do you live?

A. I live in Harney Valley.

Q. How long have you been there?

A. Three years.

Q. What are you doing out there?

A. At the present time I am working for Mr. Hanley.

Q. Have you got any interests of your own out there?

A. Nothing whatever. I have a homestead out there.

Q. You don't count that for anything?

A. No, not there.

Q. Yet awhile. Well, what are you doing for Hanley?

A. I have been working on the river this year, this spring.

Q. How long have you been working for him?

A. Well, I have worked for Mr. Hanley off and on for the last two years.

Q. What have been your special duties this year?

A. This year—you mean this spring? Or the first of the year?

(Testimony of John Ryan.)

Q. Well, the first of the year.

A. I fed cattle part of the time, and when they turned the cattle to the hills, I have been working on the river.

Q. What have you been doing on the river — what part of the river?

A. Looking after the water, and I have worked on the river from north of 27 down to the Fennimore place.

Q. Well, now, what particularly have you been doing? What acts?

A. Looking after the irrigation.

Q. Yes, but doing what?

A. Oh, looking after the dams, and closing the breaks in the river.

Q. Where have you been closing breaks in the river?

A. On 27 on the east side.

Q. Do you mean by breaks in the river, in the river bank?

A. Yes.

Q. Here is a photograph "Break in the river bank, East Fork of Silvies River, about one quarter mile above the Hanley drain ditch."

A. Above the Hanley Drain ditch?

Q. Yes. "Part of the Hanley Irrigation System," —Plaintiff's Exhibit 15. Do you recognize that?

A. Yes, sir.

Q. Whose work is it?

A. It is not mine. That is on the west side of the river.

(Testimony of John Ryan.)

Q. Do you know who constructed it?

A. I do not.

Q. Have you been there at this place?

A. Yes, sir.

Q. I will ask you whether that is a permanent irrigation structure or a temporary structure, to stop the river going out?

A. Well, that would be a temporary structure.

Q. The river is on the side towards you, toward the looker?

A. Yes, sir. But that is on the west side of the river.

Q. Yes, that is what it says.

COURT: You say that is a temporary structure?

A. That would be a temporary structure.

COURT: I understand then, from you, that the water goes out that gap, and that that is put in there to keep the water in the channel temporarily?

A. While the water is high at all, it cannot be fixed permanently. You understand when the water is running out you cannot put dirt or anything in there. You cannot make it stay.

COURT: Oh, I understand.

Q. Did you repair any breaks in the bank, any gaps in the bank of the river yourself?

A. Yes, sir.

Q. Where? What part of the river?

A. On the east side, repaired two on the east side, and I did fix that one temporarily later on.

(Testimony of John Ryan.)

Q. There is a statement here that there is a very wide cut made in the bank of the river, in order to let it out in the left bank of the river—that would be the east bank of the river—about 900 feet below the Hanley drain ditch, a cut in the bank about 12 feet wide, and three feet deep. Was there any such cut made?

A. There was a break there. That is correct as to the size.

Q. And location?

A. And location, yes, sir.

Q. You mean a natural break in the river?

A. That is what it would look like to me. It was washed out. I fixed it.

Q. You didn't make any cut there?

A. I did not.

Q. Did you do anything toward it at all?

A. I did. I fixed it up. My instructions were to fix all of them.

Q. How did you fix it? What did you do?

A. I put poles across where the water was high, put poles similar to that one in the photograph across this break. I run those boards down in there, the first day I went up on horseback, I carried a shovel and a saw. The ground was so soft it was pretty near impossible to get a team in—it was impossible to get a wagon over it. I put that structure in like that, and with my shovel tried to put some dirt in it to stop it, you see, but I could not make it stick. So I hung up my shovel and went back home, and the next morning brought the team and a sled which I could haul over the ground, and

(Testimony of John Ryan.)

fixed it with the stack bottom. That is all you can make stay when the water is running over the banks of the river on both sides.

COURT: What kind of a bottom?

A. Bottom of the old stack, where the cattle come in and tramped it, make it wet and solid, it will sink in the water, going against those boards, and will not wash. I fixed it with that until it was perfectly tight, and until the river goes down, and can be fixed permanently.

Q. Instead of opening the river, then, you closed it?

A. Yes, sir.

Q. Here is a place about 1,000 feet above the south line of Section 27 on the left bank of the river, the east bank—a cut—it doesn't give the dimensions. It doesn't give the dimensions, but there is a location about 1,000 feet above, or north of the south line of Section 27 on the east bank of the river. Do you remember any such cut?

A. There was no cut that there was any water going out of on that side. There had been a cut—there was a cut there that had been fixed, and there was a few muskrat holes where the water was coming through, probably in streams like your arm, which I closed. That is all the break there was in that location.

Q. Who gave you your orders to keep the river banks tight?

A. Mr. Hanley.

Q. In the whole length of the river, there in Section 27, or as far as you have any charge of it, are there any

(Testimony of John Ryan.)

cuts made artificially for the purpose of letting the river out, or are they all natural cuts?

A. I have never seen any that was made artificially. They all seem to be natural, and have been closed up; wherever it showed there has been a cut, they have all been closed some way or other.

Q. Did you have anything to do with closing the drain ditch?

A. That is the one that goes east from the river?

Q. Yes.

A. Yes, sir.

Q. What time was that?

A. I put the boards in on the 5th of April.

Q. State how you closed it?

A. I put the boards in on the 5th of April, that is full, clear up—I don't remember how many—all I could get in. Then next day I fixed this break that we have been speaking about, that went east. I think I was a day or two days on that. I know one, and I think two days, and at the same time I went up to see how this was working, because my instructions were to close it tight.

Q. Who gave you the instructions?

A. Mr. Hanley; and I found that where the boards apparently were not down to the flow, that there was an underdraft of water going out, so I gets another plank and tries to pound them down, and found too much pressure on them, so I hauled this stack bottom, manure, and chinked them in there, till I did stop the flow of water.

(Testimony of John Ryan.)

Q. Well, were there any leaks around it, in through the wings?

A. No, it was a new structure.

Q. Any rot in the structure?

A. Rot?

Q. Yes, rot in the boards?

A. It was new lumber, what I could see of it, apparently. There was no rot, no.

Q. Do you know the gate and ditch known as the Orphan headgate?

A. Why, yes.

Q. Now, it has been left a little bit in dispute here, where the water goes from that ditch. Have you ever seen it running off?

A. Why it goes west from the river.

Q. I know, but after they get through with it, in using it for irrigation, where does it finally end up?

A. Why, in what is known as Chapman Slough.

Q. Have you seen it going down there?

A. I have.

Q. This year?

A. This year.

Q. Do you know a dam called the Fennimore dam?

A. Yes, sir.

Q. Where is that located?

A. It is in the northeast corner of Section 3.

Q. Was it part of your duty to look after that?

A. It was.

Q. Did you put in the boards?

A. I did.

(Testimony of John Ryan.)

Q. This year?

A. Yes, sir.

Q. When?

A. Along about the middle of April, I think, or middle of March.

Q. How many times did you have to put them in?

A. Oh, seven or eight times.

Q. Who took them out?

A. Well, I never caught anybody taking them out but once. I don't know the man's name, but he said he was working for the P. L. S. Company, and was taking them out under Mr. Newman's instructions.

MR. TREADWELL: We are perfectly willing to admit that.

COURT: You say it was in April that you were putting those in?

A. April, yes.

MR. TREADWELL: You said March.

A. Yes, I said March, but it was in April. It was about the middle of April. I was thinking this was April, but it is May. There was ice in in March—it didn't need any boards.

Q. You located this Fennimore dam, didn't you, in your testimony. Where is it?

A. It is in the northeast corner of three.

Q. That is below the Orphan headgate?

A. Below the Orphan headgate, yes.

(Testimony of John Ryan.)

CROSS EXAMINATION.

Questions by Mr. Treadwell.

Mr. Ryan, you stated that you put the boards in the drain ditch, I think, about April 5th. How many boards did you put in at that time?

A. I don't know. I saw some narrow boards—there wasn't boards enough there to fill it, and I think I put in one or two new ones, and I took some of—there was a pile of lumber that had been taken out of the old headgate—and I picked out the solid lumber and sawed some, and put them in, some six, some four, some ten inches, till I filled it full. I don't know how many there were.

Q. Did you put in any more after that?

A. I did not.

Q. How did you fix the date of that?

A. I make a note of my work.

Q. Did you make a note of that work?

A. I did, sir.

Q. Have you got it here?

A. No, sir. I made a mental note with my wife.

Q. Were all the boards in the dam when that picture was taken?

A. That don't show any water going over the top to speak of.

Q. It don't?

A. A little bit right here, and a little there. That is water is coming under.

Q. All coming under, is it?

(Testimony of John Ryan.)

A. You see just a little stream of water there and there, in three different places going over.

Q. This is where the water was stopped? The dark place is where the upright is. There is no water. All this other is water.

A. This board above this dark line here, that is a board up that way, above this dark line. This water is coming under.

Q. There isn't any water pouring over the dam there at all. (Referring to Exhibit 8.)

A. It don't look like that to me. It looks like three little streams of water, and this boiling here up from in under.

Q. The dam was not very tight then, Mr. Ryan?

A. No, I testified that it was not tight underneath, when I first put it in, before I put this manure in, in the next day or two.

Q. When did you put the manure in?

A. Not later than two days after I put the boards in.

Q. About these cuts in the bank. Besides these cuts where there is stuff stuck in like the ones we show in this picture here to regulate the water, you say there is quite a number of —

MR. WOOD: May it please the Court, counsel I presume knows that he cannot put a question which will, as answered, mislead the witness. Now, there is not one particle of testimony here that these temporary repairs are to regulate the water.

(Testimony of John Ryan.)

MR. TREADWELL: I object to the witness being told counsel's theory of this matter when I am cross examining the witness.

MR. WOOD: It is an unfair question, therefore, when he says to the witness "Now, when these boards that are put in to regulate the water"—the witness' mind would not perhaps grasp that, and I object to the inference that they are put there to regulate the water, until there is some testimony here that they are put there to regulate the water.

COURT: I am keeping that in mind. I think I will not be misled by it. Go ahead with your question.

MR. WOOD: Of course, your Honor, we have to make this record for any possible future use.

COURT: Yes, I understand.

Mr. Ryan, if these boards are not put in these cuts for the purpose of regulating the water, will you please tell me what they are there for.

A. What boards are you talking about?

Q. Why, the boards in any cut along the river bank?

A. What are they put there for?

Q. Yes.

A. My experience in putting them there has been when I want to fix a break, to put them in there to kind of check the current so that you could make other stuff stay until you could stop it.

Q. So they are put there to stop the water when

(Testimony of John Ryan.)

you want it, and when you want to close the water out, you stop them up—is that correct?

A. When I am closing a break, I put that in; that is, I cannot fix it —

COURT: I understand this witness has already testified those boards were put in there to stop a break, and not for regulation?

A. I cannot fix it otherwise.

Q. I mean they are put in there to keep the water out when they are put in there, are they not?

A. To keep it in the river.

Q. To keep it in the river when those are out. If they were not out, the water would come out of the river there, though?

A. Of course if there is nothing in there, it would run out of the break.

REDIRECT EXAMINATION.

Q. Are they any part of an irrigation system to be taken out and put in as part of an irrigation system?

A. How is that?

Q. Are they any part of an irrigation system to be taken in and out, to let the river run out as a part of an irrigation system?

A. Where?

Q. These boards that we are talking about. Do they form any part of any irrigation system?

A. Not those that we put in to stop a break in the river bank don't.

(Testimony of John Ryan.)

RECROSS EXAMINATION.

Q. You do have them out—when they are not there the water is running out onto land?

A. I haven't had any of them out.

Q. You haven't had any of them out this summer?

A. No, sir, I have been putting them in and putting stuff in to stop them.

Q. When was it Mr. Hanley told you to close those up this year?

A. This year?

Q. Yes.

A. It was along the 3d or 4th of April.

REDIRECT EXAMINATION.

Q. There wasn't any exception made. You were to close them all?

A. Close them immediately. I had other work in 5 I was doing, and I was to stop that and close these immediately.

Q. What condition have you found the Orphan headgate in when you went by?

A. I have always found it open. That is, water running out.

During the course of the argument the witness John Ryan was recalled and testified as follows:

EXAMINATION BY THE COURT.

Q. Do you know what time the ice went out of the streams there?

(Testimony of Will McLaren.)

A. It was some time the latter part of March, the middle of March, along there some place.

Q. That would be from the middle to the latter part of March?

A. Yes. It was pretty well froze. We was feeding cattle there. That river was deeply froze. I was feeding cattle there, up till about the 20th of March. There was still ice in the river then.

Q. Then what time did the flood waters come?

A. The flood waters come between the 5th and the 10th of April.

MR. WOOD: You are not familiar with the whole river?

A. No, sir."

WILL McLAREN,

A witness for the defendant William Hanley, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Wood:

"Where do you live?

A. I live near Burns.

Q. Harney County?

A. Yes, sir.

Q. How long have you lived there?

A. 18 years, I think.

Q. You are a son of George McLaren, that just testified this morning?

(Testimony of Will McLaren.)

A. Yes, sir.

Q. You have some property of your own out there, haven't you?

A. Yes, sir.

Q. What section is it in?

A. East half of 15.

Q. Did you ever work for Mr. Hanley of the William Hanley Company?

A. Yes, sir.

Q. At what time?

A. I worked for him, I don't know exactly what time, but very near all the time, off and on all the time.

Q. What was the general nature of your work?

A. Putting up hay and feeding it out.

Q. Did it have anything to do with the water?

A. Yes.

Q. Such as what?

A. Putting in dams, and helping fix levees, and that.

Q. Did you ever have anything to do with helping to keep the banks of the river in repair?

A. Yes.

Q. Did you ever get any orders at any time to cut the banks of the rivers, to let the water out?

A. No, sir.

Q. Did you ever do it?

A. No, sir.

Q. Did you ever use the banks of the rivers as a part of your irrigation system out there?

A. No, sir.

(Testimony of Will McLaren.)

Q. Did you see the Hanley drain ditch at its head this spring?

A. Yes, sir.

Q. About what time?

A. About the 1st of March.

Q. What was the condition of it?

A. It was full of ice, and backed up water in it.

Q. Was it open?

A. Yes, sir, it was then.

Q. Did you see it any subsequent time, any later time?

A. No, not this year.

Q. Where did you find the boards of the drain ditch at that time, when you went up there, the boards for stopping the —

A. The ones that was in it was floated down against the ice, about ten feet below the dam.

Q. What did you do with them?

A. I took them out and tried to put them back in, and they would not stay, and I put them on the bank.

Q. Why wouldn't they stay?

A. The water and ice had backed up there, there was no current to hold them down.

COURT: That was about the first of March?

A. Yes, sir.

Q. What are your instructions about that ditch, the drain ditch?

A. About keeping it closed?

Q. Yes.

(Testimony of Dave McLaren.)

A. My father, he was the one told me to go up there and shut it up.

Q. Who told you?

A. My father. He told me to go and shut it up.

CROSS EXAMINATION.

Questions by Mr. Treadwell:

When did your father tell you to shut it up?

A. About the 1st of March somewhere.

Q. You are talking about this same trip that you took then?

A. Yes sir."

DAVE McLAREN,

A witness for the defendant William Hanley, testified as follows:

DIRECT EXAMINATION:

Questions by Mr. Wood.

"Where do you live, Mr. McLaren?

A. Near Burns.

Q. Are you a son of George McLaren, that testified here this morning?

A. Yes, sir.

Q. Have you got any property out there yourself?

A. Yes, sir.

Q. Where is it situated?

A. About four miles east of Burns.

(Testimony of Dave McLaren.)

Q. It is not on the river?

A. No, sir.

Q. How long have you lived out there?

A. I have lived there about five years. I have lived in the valley for 15 years.

Q. And have you ever done any work on the Hanley ranches in assisting your father?

A. Yes, sir.

Q. What character of work?

A. I have helped with the haying on the ranches, put up the hay.

Q. Have you ever helped about taking care of the water and the dams?

A. Not very much—some.

Q. Did you ever help about on the river banks, keeping them in repair?

A. I have helped fix up one place.

Q. Did you ever make any cuts in the river so as to let water out for irrigating?

A. No, sir.

Q. You say you have made repairs?

A. Yes, sir, helped build a cut up.

Q. Build the cuts up. How was the ice in the river this year, as compared to most years?

A. Well, I was never over the river, but I have been out along there, and it was froze solid. I never seen it froze solid before.

(Testimony of Dave McLaren.)

CROSS EXAMINATION.

Questions by Mr. Treadwell:

Q. Where was the cut you filled up?

A. Just about the middle of Section 27.

Q. On which side?

A. Do you mean on which side of the river?

Q. Yes.

A. On the east side of the river.

Q. Describe the cut.

A. Well, it was a place about 10 to 15 feet wide, and we took and plowed a lot of sod there, and took a sled and carried it in there, and made an embankment about five feet wide there.

Q. How was the cut made?

A. It looked like it just washed out of there.

Q. When did you fill it up?

A. About two years ago.

Q. Has it been opened since?

A. No, sir.

Q. No water gone out there at all?

A. Not without the muskrats dug a hole through it.

Q. How is that?

A. Not without the muskrats dug a hole through it."

(Testimony of George W. Young.)

GEORGE W. YOUNG,

One of the defendants, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Webster.

“Is there another dam in above, or just near the north line of the section?

A. Yes.

Q. What is that dam called?

A. Well, they call it the Young dam. It is really the Hanley dam.

Q. What section is that in?

A. That is in Section 19.

Q. Just above there?

A. Yes.

Q. You have it shown on your map there, have you?

A. Yes, sir.

Q. Point that out to the judge, if you please. Where is that?

A. Right there. (Pointing to diagram.)

Q. Just above the section line there?

A. Yes.

Q. Who put that dam in there?

A. Well, I myself and some of Mr. Hanley's men.

Q. And who owns the dam? Whose is it?

A. It belongs to Mr. Hanley.

Q. Do you claim any interest in that dam at all?

A. No, sir.

Q. Who uses that dam?

(Testimony of George W. Young.)

A. Why, the Hanley Company, I suppose.

Q. For what?

A. For the irrigation of Section 29.

Q. For the irrigation of 29?

A. Yes.

CROSS EXAMINATION.

Q. After the court passed on that other contempt matter, did you sell this dam to Mr. Hanley?

A. The sale was made before the court proceedings were begun.

Q. Before the contempt proceeding?

A. Yes, sir.

COURT: Was Mr. Hanley a party to that other contempt proceeding?

MR. TREADWELL: I think not, your Honor.

MR. WOOD: No, sir.

Q. How long before the other contempt proceeding, had you sold Mr. Hanley the dam?

A. About two years, I think.

Q. Had you sold him all interest in it, or just an interest in it?

A. Sold him all interest.

Q. So you didn't have any dam at all?

A. No, sir.

Q. You first constructed it yourself, and then you sold it to him?

A. Well, I constructed it with the understanding that it would be used for the irrigation of Section 29.

(Testimony of George W. Young.)

Q. Well, Mr. Hanley, says he never had anything to do with it until after the contempt proceeding, when he bought it from you, to settle an account for some hay.

MR. WOOD: I ought to correct that, Mr. Treadwell. It is my mistake in Mr. Hanley's affidavit.

MR. TREADWELL: It is not in his affidavit—it is in his testimony right here in court, where he disputes his affidavit, and makes a new version.

MR. WOOD: It may be that I am wrong. I know I got it wrong in the affidavit.

Q. Well, now, how about it, Mr. Young? What is the fact?

A. The deal was made long prior to the contempt proceedings.

COURT: What defense did you make in the contempt proceeding, then?

A. I alleged that the dam belonged to Mr. Hanley.

Q. You alleged in that proceeding that the dam belonged to Mr. Hanley?

A. Yes, sir.

COURT: Was that tried out?

A. Yes.

MR. WOOD: I want to ask some questions. There seems to be a difference here between your testimony and Mr. Hanley's.

Examination by Mr. Wood:

Q. When did you say he bought the Young dam?

A. It was in 1909.

(Testimony of George W. Young.)

Q. He said something about making a trade, as I understood it, for hay that you used. Was that part of the consideration?

A. That was part of the consideration. The hay I had got, afterwards.

Q. What year was that?

A. Well, I think that was two years ago or three—two or three years ago.

Q. Well, if he had bought you out in 1909, what was the occasion for any further consideration?

A. Oh, that consideration was earlier than that.

Q. It was what?

A. That consideration was earlier than that. It was not all completed.

Q. Well, he bought you out, then; you did have some sort of interest in the dam?

A. Well, technically I did.

Q. What was that? How did that interest accrue? How did you get it?

A. In the first place?

Q. Yes.

A. Well, it was not all paid up.

Q. I know, but I say, how did you get your interest originally in the dam?

A. Well, I furnished the timbers and done the work.

Q. You built the dam?

A. Yes.

Q. I see. All right."

(Testimony of Carey Thornburg.)

CAREY THORNBURG,

One of the defendants, testified as follows:

DIRECT EXAMINATION:

“Q. The water goes out on 31, out of that 31 or Luig dam,—I don’t care which you call it; what the name of it is don’t make any difference to me—does that take the water out on 31?

A. Yes, sir.

Q. And it is used on 31?

A. Yes, sir.

Q. Where does the water go off 31?

A. Well, it runs down through 5, irrigates Section 5, a portion of it.

CROSS EXAMINATION.

Questions by Mr. Treadwell:

Mr. Thornburg, you say the water from the Luig dam goes onto 31, and then on down onto Section 5?

A. Yes.

Q. I take it from that, it never gets onto Section 6?

A. Yes, a portion of it does.

Q. Gets onto Mr. Luig’s land and irrigates it, doesn’t it?

A. Yes.

Q. Why did you forget that?

A. I wasn’t asked by you.

Q. You were asked where it went.

A. I said a portion of it went on 5, didn’t I? That’s what I said.”

(Testimony of William Hanley.)

WILLIAM HANLEY,

The defendant was re-called and testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Wood:

“Mr. Hanley, in your affidavit is a statement that you didn’t know of the contempt proceedings against the Young dam when you purchased it. Then you took the stand, and, as I understand it, you testified that you knew, in a general way that there had been contempt proceedings. Then you said that you had taken over Young’s interest in the dam, on some hay account. Now, I understand from Mr. Young’s testimony that you took over the dam earlier than that, and before the contempt proceedings. Having heard him, is your memory refreshed so that you can state anything more definitely about the facts?

A. Mr. Young said that I had taken it over in 1909, and refers me to Mr. Billie Miller, my attorney at the time, that he had taken a bill of sale, and there is a bill of sale of it recorded in the records of the county clerk’s office at Burns. Now, I would say that I want the court to understand that my interest in that dam is for Section 19, and the rights that I claimed for Section 29. They corner with one another. And in the part of constructing it, why, I guess probably I had an interest in it. But at any rate, I had paid a matter that Mr. Young had told me, and refreshed my memory on it, and that was some money that he was owing on the lease of

(Testimony of William Hanley.)

Section 29, that I had paid that. And I remember paying that to the Road Company, and probably in my hay statement, that was an overplus of another payment, and I probably put in something when the dam was constructed. But the dam was moved up to Section 19, and the rights in there I claim for Sections 19 and 29, I claim for the Harney Valley Improvement Company.

Q. Were they in the decree?

A. The Harney Valley Improvement Company is—19 and 29 is not in the decree.

Q. How great a territory and area do these properties of yours cover, that you have charge of up there?

A. The William Hanley place has about 10,000 acres in it.

Q. I mean, in meridian distances, what distance apart? What territory do you have to cover?

A. About 300 miles to go on the properties of the William Hanley Company, and the Blitzen and Harney Valley Improvement Company.

Q. Are you the active manager?

A. I am.

Q. Do you make sales of cattle, and everything?

A. Yes, sir.

Q. You are away a good deal, are you?

A. Yes, sir, I am.

COURT: Mr. Wood, do I understand that Mr. Hanley's testimony includes Section 19, along with the transfers and deeds that he acquired indirectly from Altschul?

(Testimony of Henry Luig.)

MR. WOOD: I would have to ask him myself. I don't remember these things very well.

Q. Was 19 acquired from Altschul?

A. 19 belonged to the Harney Valley Improvement Company.

Q. But it is an Altschul title?

A. It is an Altschul title.

Q. Was it ever in the decree?

A. It was never in the decree.

MR. MINOR: Was that leased at the time of the decree by Levens?

A. Yes.

MR. TREADWELL: Expressly provided he had a lease of it only.

MR. WOOD: Mr. Treadwell reminds me of something. That is correct. I remember myself making a lease of the section to Levens, and he was a party as lessee at the time of the decree."

HENRY LUIG

Defendant, testified as follows:

CROSS EXAMINATION:

Questions by Mr. Treadwell:

"Mr. Luig, you and your brother Caspar put the first dam in there, did you not, in Section 31?

A. Oh, no. Sam Voegtly.

Q. Voegtly owned your place before you got it?

(Testimony of Henry Luig.)

A. Yes, he had a section.

Q. When did Voegtly put it in there?

A. In 1886. Henry Voegtly put that dam in in 1886.

Q. When did you get it—you and your brother?

A. I can't tell you exactly.

Q. About when.

A. He proved up on the land, and then he sold it.

Q. He proved up on the ranch and sold it to you?

A. Yes.

Q. Do you know how long ago?

A. I think it took three years.

Q. Two or three years after 1886?

MR. WEBSTER: He says it took three years to prove up on it.

Q. You and your brother, until your brother's death, used the dam, did you, until that time?

A. Yes.

Q. Since your brother's death, you have used it every year, have you?

A. Yes. We have put a new dam in.

Q. When did you put the new one in, Mr. Luig?

A. I think in 1905 or 1906—something like that.

Q. When you put in the new dam, did you have any talk with Mr. Hanley at that time?

A. I don't know — I wasn't here — if the other brother put that dam in. I went to Washington. After I came back, the dam was there.

Q. Didn't you give any interest in it when you put in the new one, to Mr. Hanley?

(Testimony of Henry Luig.)

A. I don't know.

Q. You don't know?

A. No.

Q. Well, when you built the first one, you didn't ask Mr. Hanley anything about it, did you?

A. No.

Q. You just went there and built it?

A. Yes.

Q. You didn't ask the Road Company anything about it, did you?

A. That is what the other brothers say. I don't know nothing about it.

Q. So far as you are concerned, you and your brother simply went there and built that dam, and didn't ask the Road Company anything about it, did you?

A. I believe somebody what owned it went at that time. I don't think they can leave it out. I was not here.

Q. Mr. Luig, you testified just the other day over in the proceeding before Mr. Corcoran, didn't you?

A. Yes.

Q. Didn't you testify then that Mr. Hanley never had anything to do with that dam until you put the new one in, in '4, '5 or '6?

A. Yes.

Q. That is right, isn't it?

A. Yes.

Q. He never had anything to do with it before that time, is that right?

(Testimony of Henry Luig.)

A. So then after other brother was living, he attend to the business. I don't attend to it.

Q. When you built that new dam, did you take Mr. Hanley in with you and have him help you build it?

A. I don't know. The other brother built it.

Q. Didn't you testify over before Mr. Corcoran, that when you built the new dam you allowed Hanley to help you build it, and gave him an interest in it? Didn't you so testify?

A. Hanley helped our —

Q. Hanley helped you rebuild it?

A. The other brother said he did.

Q. Weren't you right there when the dam was rebuilt?

A. No, I was in Washington.

Q. How long did you stay in Washington?

A. Oh, when I come back the dam was built.

Q. When did you first learn that Mr. Hanley had got an interest in it?

A. That is what the other brother said.

Q. Your brother told you when you came back that he had given Mr. Hanley an interest in it?

A. Yes, that he paid half of the expense. If he done it, I don't know. I got nothing to show.

REDIRECT EXAMINATION.

Q. That dam was first built by Peter Stenger, wasn't it?

A. It looked like it was there, before Sam Voegtly.

(Testimony of Henry Luig.)

Q. Peter Stenger took a lease of Section 31 from the Road Company, didn't he?

A. Oh, yes, that is what they say.

Q. That is what you understood?

A. Yes.

Q. Hanley succeeded Peter Stenger in that lease, didn't he?

A. I believe he did.

Q. And Hanley has used that dam right along, hasn't he?

A. Most of the time, yes."

At the close of the testimony the following colloquy occurred between court and counsel:

"MR. WOOD: I am going to urge, irrespective of any testimony the court allowed to come in for illustration, they (the plaintiff) are bound by the allegations of the complaint.

MR. TREADWELL: We will not dispute that.

COURT: That will not be disputed."

Approved:

CHAS. E. WOLVERTON,

Judge.

Filed, November 29, 1915. G. H. Marsh, Clerk.

DEFENDANT'S EXHIBIT "A"

(Copy for Mr. Hanley)

C O P Y

MILLER & LUX INCORPORATED

1307-1318

Merchants Exchange Building

San Francisco, April 5th, 1915.

Mr. Harry L. Corbett,

Corbett Building,

Portland, Oregon.

Dear Sir:

We wish to take this opportunity of calling your attention to a matter of great personal interest to yourself as well as to our company.

One C. B. McConnell has been making an examination of the acquisition of title from the state, of land in Harney Valley and prevailed upon Governor West to institute a suit against our company to recover some twenty-six thousand acres of land. Much of this land, and particularly the swamp land, was acquired in the same manner that the lands of the Blitzen Company were acquired, and in fact we are informed that much of it was acquired under the same applications of purchase from the State of Oregon. McConnell has stated that he has also made an examination of the acquisition of title by the Blitzen Company, and we also have a personal knowledge that he has done so. He has also stated that he intends to have brought a like suit for the recovery of that land.

We are not at all afraid of the merits of this litigation, but we do object to having our titles questioned by a man who is actuated entirely by personal motives, and we would regret seeing the same done in regard to your company.

We purchased our land from Todhunter and Devine in good faith as you purchased yours from the French-Glenn Company, and the injustice of compelling us to meet a charge of fraud alleged to have been committed thirty years ago is apparent.

We are calling this matter to your attention for the reason that a few days ago when we showed the Governor and members of the State Land Board the true facts of the matter, and the motives that were prompting McConnell, the Board unanimously decided to dismiss the suit. Immediately McConnell began to bring new support to his cause, and, among others, your superintendent Mr. William Hanley, whose interview appears in the Oregon "Journal" of March 28th, 1915.

We can not believe that in order to prevent this man McConnell from pursuing your company you would be a part to any alliance with him as against our company. On the contrary, we know that if you understand the situation you would not have permitted Mr. Hanley to assist in any opposition of this kind, but on the contrary would join with us to do everything that you could to stop this attach upon our rights?

So far as Mr. Hanley, individually or otherwise, may have any litigation with us over water, we are perfectly

willing to fight it out on its merits, but we do not propose to permit him, without protest, to use that as an excuse for joining in an unwarranted attack upon the titles of persons holding large amounts of lands in Harney Valley. Instead of encouraging anything of that kind, you should, and we believe would, do everything in your power to prevent such an attack.

We trust that you will fully appreciate the spirit in which this is written, as we do it with a sincere hope that you will exercise what influence you have to our advantage rather than against us in this important matter.

Our Mr. Treadwell will be in Portland Saturday and would be glad to see you regarding this matter.

Yours truly

MILLER & LUX INCORPORATED

(Signed)

By J. Leroy Nickel

Filed, May 12, 1915.

G. H. Marsh, Clerk.

DEFENDANT'S EXHIBIT "B"

April 20, 1915

Messrs. Miller & Lux Incorporated,

Merchants Exchange Building,

San Francisco, Cal.

Attention Mr. Nickel:

Gentlemen:

My answer to your letter of April 5th has been long delayed owing to a visit to San Francisco and the Fair.

My absence was also responsible for missing Mr. Treadwell on his visit to Portland, and I trust you will accept my apologies for not replying sooner and convey to Mr. Treadwell my regrets at not having seen him.

Taking up your letter in detail, I can immediately say for myself and our company that I have not and will not encourage an attack upon your or any man's land title, regardless of how the same line of conduct might affect my own holdings. If the State of Oregon has seen fit to investigate your title, I know absolutely nothing of the origin of that investigation beyond newspaper reports upon which I do not rely.

My associates and I bought our property in good faith as you say and upon favorable report of our attorneys on abstracts. I feel that I have a perfect right to assume that our titles and your titles are litigation proof. I am not attempting to deny as a general proposition that questions of fraud should not be unearthed for the benefit of the people of this state, but I do not hesitate to affirm that I do not believe that either your titles or our titles are fraudulent or that the question of fraud should now be raised against titles which have passed into our hands in good faith for heavy value and consideration. I believe your titles are much the same as ours are and I am stating my position as above because I believe it to be exactly Mr. Hanley's position as well as my own.

I think the article you enclose has nothing in it from which I can infer that Mr. Hanley was attempting to pass on the legitimacy of your land titles. I shall not

attempt to conceal what has become through various legal actions common knowledge, namely, that Mr. Hanley has the feeling that the general policy of the Pacific Live Stock Co. in Oregon has been unneighborly and narrow toward him and has been a policy of exclusion as to the general settlement of the country, but as far as I am informed that is as far as his sentiment goes.

I do not say of course that he is right in this assumption, but a long course of years has imbedded this belief in his mind. Further than this I have never heard him go, and I am positive that he has no personal animosity against you or your company, and I am equally positive that he would never attempt to stir up official investigation of your land titles in retaliation for any private suit between your company and him. I am satisfied in my own mind that Mr. Hanley is not back of any attempt to stir up trouble for your company.

The article in question quotes Mr. Hanley not in relation to land titles as I read it, but primarily in relation to opening up and settlement of Harney Valley. As you know, he is enthusiastic on the subject of developing the country for settlers. He believes the greatest values lie in that direction. He believes nothing can be done without a railroad, and he does believe that the policy of your company is opposed to development—opposed to a railroad—and that it prefers to keep the country as an empty cattle range.

I personally hope that this is not the case with you, as I believe the time is past when we can attempt to

exclude settlers from this great region and hold it as a private cattle pasture. Apart from the fact that I do not believe we have a moral right to attempt to shut this country up to settlement and development, I think that you will unquestionably agree with me that greater profits lie in the fullest possible development, for you have seen this work out in your California holdings.

This reply I am making on my own responsibility, but I feel under the circumstances with my kindly feeling toward yourself and my long, intimate and personal connection with Mr. Hanley, that it will be impossible for me not to call the matter to his attention, and I am accordingly sending to him a copy of your letter with carbon of this reply.

I hope you will always be as frank as you have been in this instance and that we may be able to work together for the general good of the Harney country.

Very truly yours,

HLC/S

Copy to Mr. Hanley

Filed, May 12, 1915.

G. H. Marsh, Clerk.



MAP
OF
A Portion Of Silver River

IN
HARNEY VALLEY, HARNEY COUNTY, OREGON.
TOWNSHIPS 23 S. R. 31 E. 24 S. R. 31 E. & 24 S. R. 32 E. W. 11.

SHOWING
*Ditches and sloughs used in diverting water from River, and
disposition made of water so diverted.*

Scale, 1000' to 1"

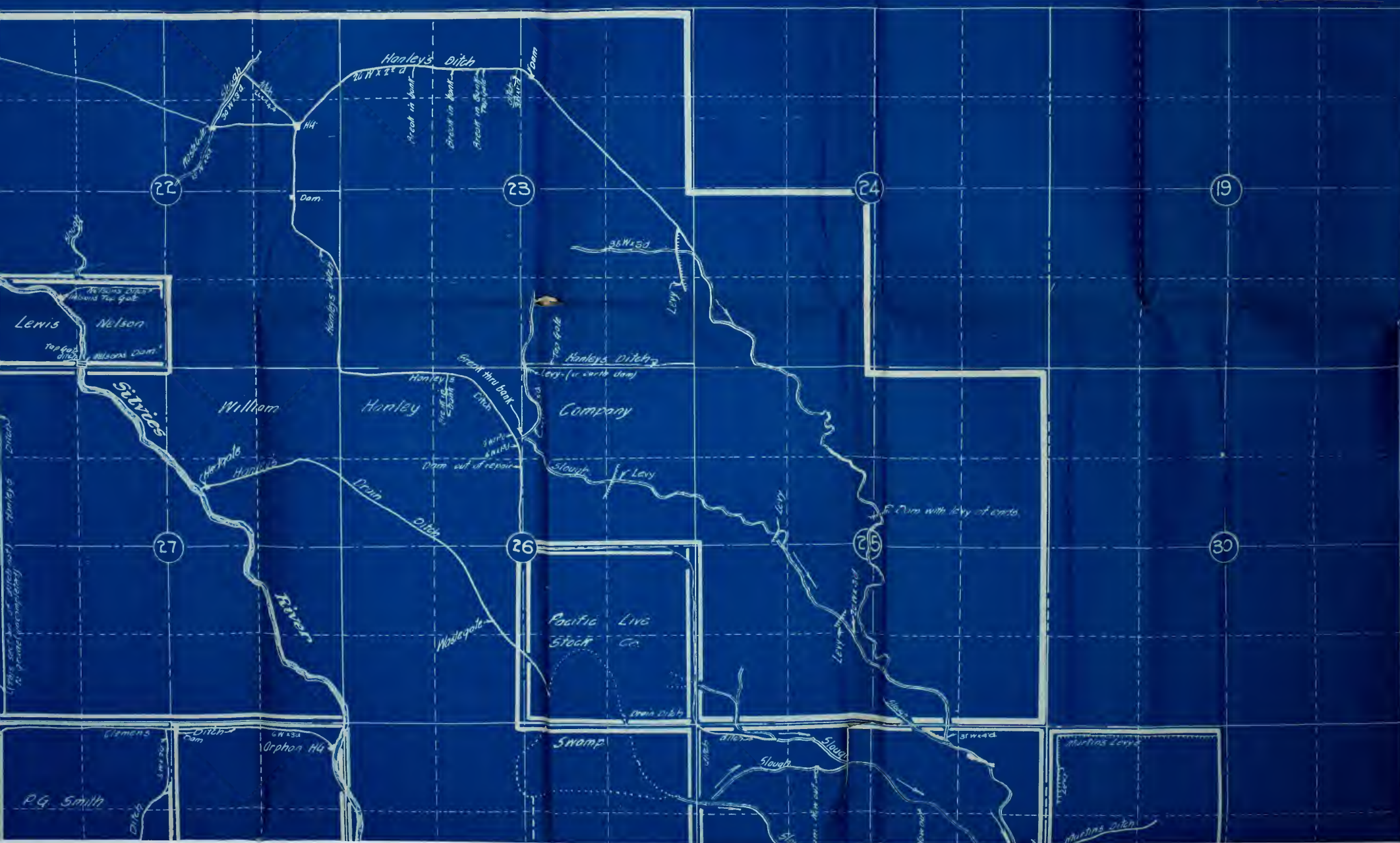
Survey begun Nov. 30, 1908, - Completed June 20, 1909.

A.D. Foulthner, Civil Engineer.

Burns Oregon.

U.S. CIRCUIT COURT
FILED
DEC. 17, 1910.
H. Marsh Clerk
District of Oregon.

P.L.S. Co. }
vs. } *Complainants Exhibit 4*
W.D. Hanley }
A.W.F.
S.P. EX.



36

31

32

33

1

6

5

4

7

8

9

W. V. & C. M. T. W. R. Co.
T. 24 S. R. 30 E. N. 1/4

T. 23 S. R. 31 E. N. 1/4

T. 24 S. R. 31 E.

N. 1/4

Green
Hudspeth

Frank
Matney

W. V. & C. M. T. W. R. Co.

H. Matney Estate

J. M. Dalton

Pacific Live
Stock Company

Annie Glaze

Frank Matney

Frank Matney

John McNeill

New Turn Ditch
Hall
Hatchkins

P. L. S.
Co

Pacific Live Stock Co

W. V. & C. M. T. W. R. Co.

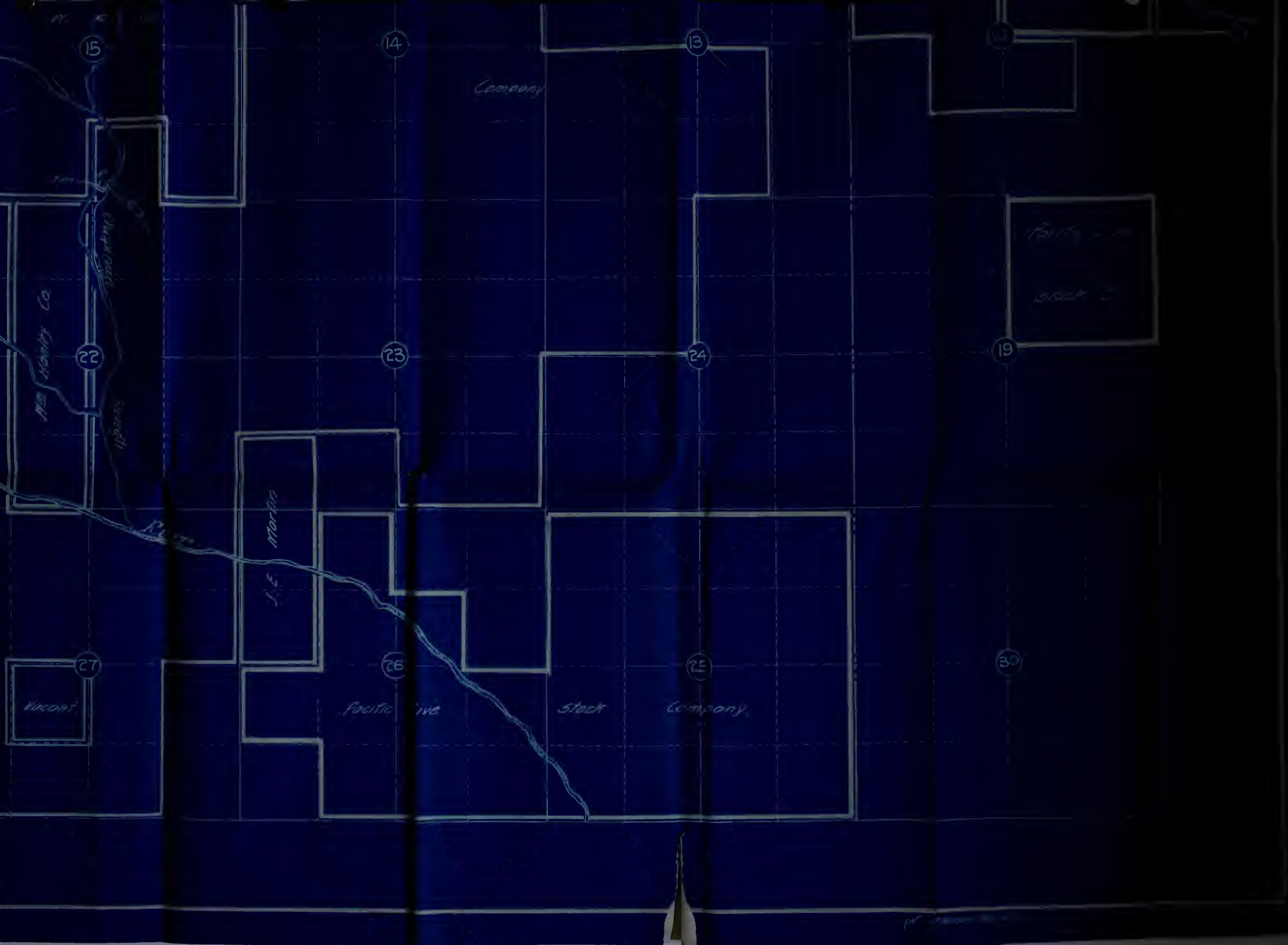
Chapman

San Juan
ditch
ditch
SWAYD
flume
slough
ditch

Slough

30 W. 1/4





And, to-wit, on the 21st day of February, 1905, there was duly filed in said Court, and cause an Opinion, by Honorable Charles B. Bellinger, District Judge, in words and figures as follows, to-wit:

OPINION BY JUDGE BELLINGER.

*In the Circuit Court of the United States for the
District of Oregon.*

PACIFIC LIVE STOCK COMPANY,
a corporation,

Complainant,

vs.

W. D. HANLEY, ET AL.,

Defendants.

Teal & Minor for the Complainant.

*Lionel R. Webster and Williams, Wood & Linthicum
for Defendants.*

BELLINGER, J.

This hearing is upon an order to show cause why the respondent should not be punished for contempt of court for violating an order and decree heretofore entered in this cause. The decree in question was entered on stipulation of the parties in a suit by the plaintiff against Hanley and others to restrain the diversion of water from Silvies river in this state. It was alleged in the complaint that Hanley had dug ditches and constructed drains in said river and "That by means of said dams the

water in the main channel and in the forks of said Silvies river have been impounded and caused to spread over a great area and made to overflow the banks of said river and to flow into said ditches, whereby the same has been diverted entirely away from the channels of said river and of its forks and has been wastefully distributed over a large area of country, and by means of evaporation, seepage, absorption and diversion from said channels, said water has become wholly lost and your orator has been deprived of the use thereof."

The decree affecting Hanley is as follows:

"That the defendant W. D. Hanley may maintain his dam in the East Fork of Silvies river where the same is now constructed and build on and across said river in section 21, township 23 south, range 31 east, Willamette meridian, and may maintain his ditches leading from said dam as the same are now constructed and built, during the irrigating season of each year and at no other time, the said irrigating season to begin after the Spring Flood of each year and from the 5th day of May of each year, and shall continue from said time until the 1st day of July of each year; and the said defendant W. D. Hanley may retain the waters of said Silvies river during said irrigating season as above described and by means of the dam as the same is now constructed in said river, may divert and use so much thereof by means of his dam and of the ditches leading therefrom as shall be necessary to irrigate section 21 and 27 in township 23 south, range 31 east of the Willamette meridian, also all of section 22, except the south half of the southwest

quarter of said section, and also the west half of section 26, also section 35, sections 23 and sections 25 in said township and range.

“That the said W. D. Hanley may maintain his ditch constructed across a portion of the land above described leading out of the east fork of Silvies river on the east side thereof on the south half of section 27 above described and extending southeasterly until it enters into and upon the land of the complainant on or near the southwest quarter of the southeast quarter of section 26, township 23 south, range 31 east, W. M., but shall maintain said ditch for the purpose of draining water from the surface of the land above described and not for the purpose of irrigation.

“If at any time and while the dam of the said W. D. Hanley is open so that it does not obstruct the flow of the water in said river and from natural causes the waters of said East Fork of said Silvies river shall overflow its banks upon the land of the said W. D. Hanley, or naturally run through either of the ditches of the said W. D. Hanley leading from the dam of the said W. D. Hanley first above described, said defendant W. D. Hanley shall have the use and enjoyment of so much of the said water of said river as may come upon his land in the manner aforesaid and during such time as the same may run thereon from natural causes and without any obstruction of the channel of said river.”

The following facts relating to the alleged violation of the decree by Hanley appear from the evidence on the hearing:

First. Hanley has extended the irrigating ditch by which water is diverted from the river in the Northwest quarter of section 21, from a point near the north and east line of section 22, through section 23 to an intersection with a slough in section 24.

Second. He has tapped the ditch known as Hanley's waste ditch, at a point in the southwest quarter of Section 26, so as to divert the water therefrom upon his own land and to prevent it from being carried upon the land of the complainant comprising the southeast quarter of said section and section 36.

Third. In the Northwest quarter of section 35 the river runs in a sharp bend over the line between the land of Hanley and that of the Live Stock Company, upon the land of the latter, and back again in a distance of some five hundred feet. Across this bend, on his own land, Hanley dug a channel through which he diverted the water by means of a check-gate. At the lower portion of this bend he built a solid earth dam in the old channel, so as to keep the water from flowing back upon the land of the Live Stock Company at the lower end of the new channel.

Fourth. On about the line between sections 2 and 3, in township 24 south, range 21 east, there was in the river channel an old check-gate known as the Fennimore check-gate, used to impede the flow of water so as to sub-irrigate the lands further up the river. This gate had become decayed and useless for the purpose intended. Hanley, since the decree in question was en-

tered, having acquired the Fennimore land, put in a new check-gate a short distance above the old one.

The Fennimore interest was not involved in the suit in which the decree was entered, and the rightfulness of this check-gate was not adjudicated. Hanley's act, therefore, in putting in this check-gate is not a matter for which he can be required to answer in this proceeding.

I am of the opinion that the extension of the ditch in question in section 23 is not a violation of the decree. The testimony is to the effect that the dam in the river at this point has not been raised, but is such a dam as the decree permits Hanley to maintain, so that the loss of water by evaporation, seepage and absorption resulting from this dam, and the diversion of water caused by the dam to flow into the ditch in question, is not a ground of complaint.

The decree provides that Hanley may maintain his ditches "as the same are now constructed and built," etc., and may divert and use so much of the water of the river, by means thereof, as shall be necessary to irrigate sections 21 and 27, etc., and all of section 22 except the south half of the southwest quarter, and also the west half of section 26, also sections 35, 23, and 25, in the township in question.

Is this decree violated by the extension which Hanley has made of the ditch in sections 21 and 22? Mr. Gilcrest, the manager of the complainant, when interrogated as to the effect of the extension of this ditch upon the company's lands in sections 36 and 26, answered,

"They have been largely deprived of water this year. An exceedingly light crop of hay grew in those two fields this year. Mr. Hanley kept the water away from those this year.

Q. By what means did he keep the water away from those two?

A. By dams across his so-called waste ditch, and using that ditch for irrigation instead of drainage.

Q. Has he used that waste ditch for irrigating during the past season?

A. He has.

Q. To what extent?

A. The capacity of the ditch.

Q. I want to ask this question: I think you possibly didn't understand it: I understand that Hanley's upper ditch has been extended by him since the decree was entered in this cause?

A. Yes, sir.

Q. Now the water from this upper ditch flows, as I understood from your testimony, into this extension?

A. Yes, sir.

Q. What effect does that water flowing into that extension have upon your use of the waters from that ditch on your sections 26 and 36?

A. It keeps the water away from our sections 26, the portion of 26 that we own, and 36; but we have no interest in that ditch of his."

It is not clear from this testimony that the extension in question constitutes a grievance to the Live Stock Company. In one part of this testimony the witness says

that the Company's lands in sections 36 and 26 are deprived of water by dams across the waste ditch, while further on, in answer to a leading question, he says that the extension of the upper ditch keeps the water from these lands, and he adds "but we have no interest in that ditch of his." In his cross-examination the witness testifies that the extension carries the water farther away than it was formerly carried, so that water that formerly found its way to the company's lands in 26 and 36 is carried farther eastward and finally crosses the northeast quarter of section 36. It appears from the testimony that the extension complained of is through the upper part of section 23, and is practically confined to that section, the end of the extension being about on the line between that section and section 24. Sections 22 and 23, and the upper half of section 26, and all of section 25, are irrigated by water diverted through the ditch in section 21. The decree definitely secures to Hanley the right to divert water by this ditch to irrigate all this land, and he has a right to make any extensions in the ditch to that end. The extension facilitates the irrigation of section 23, and the water that may flow into the Embree Slough at the end of the extension is necessarily carried on to section 25. From what appears in the case, Hanley has the right to have the water from this ditch carried farther eastward than formerly if necessary or convenient in the irrigation of the land provided for in the decree. While it provides, as stated, for the irrigation of specific lands belonging to Hanley by means of this ditch, the decree makes no provision for the use of any of this water by the Live Stock Company, and this is in

keeping with the statement of Gilcrest that "We have no interest in that ditch of his" (Hanley's). An interest in the ditch and an interest in the water carried by the ditch cannot be distinguished. A property or right in a water ditch necessarily has reference to the water which flows through it, and the inference from this testimony is that the complainant has no interest in the water which Hanley diverts from the river by means of this ditch. The effect of the decree is merely to fix the quantity of water that may be diverted by Hanley, by restricting the size of the ditch and the height of the dam at this point, and limiting the area to be irrigated by the water diverted by these means. It is solely a question as to the quantity of water that Hanley may divert from the ditch in question. He is entitled to have such quantity carried by the ditch, as it was when the decree was entered, as will suffice to irrigate the land described, and there is nothing to show that he has at any time exceeded this quantity.

The act of Hanley in tapping the ditch known as Hanley's waste ditch was authorized, according to Hanley's testimony, by Gilcrest, manager of the Live Stock Company. The fact as to this is not material, however, in view of the testimony of Gilcrest, which is to the effect that the use of this ditch for irrigating purposes by Hanley had practically no effect on the complainant's use of the water for irrigating purposes during the past spring and summer. This witness says: "This was an unusually high water year, and there was ample water—I am bound to say—came down for making a hay crop this year. It was an unprecedented year for water.

Water went over the dams. The dam was unable to hold it back. His ditch was unable to carry enough water away from the river channel to deprive the lands below there of water for a crop this year." By the terms of the decree Hanley has no right to use this ditch for irrigating purposes, and his act in doing so violates the decree. No injury to complainant resulted from such use, and under the circumstances none could result, and where injury was impossible none could have been intended.

The acts of Hanley in cutting off the loop in the river between sections 34 and 35, by digging a new channel and placing dams in the old channel, were violations of the decree. These acts are explained by Hanley, who testifies that what is known as the Orphan headgate, situated in the loop and upon the land of the Live Stock Company, had become so much out of repair that the water of the river was being diverted thereby, so as to deprive him of the water to which he was entitled for irrigating lands lower down the river; that the Live Stock Company refused to repair such headgate, and refused to allow Hanley to do so. There is other testimony to the same effect. The complainant's testimony having been previously given, there was no opportunity for it to rebut these statements; nevertheless, I am not at liberty to disregard them, and I believe them to be true. In my opinion, they excuse what was done by Hanley, and upon all the matters presented, the case is not one that calls for punishment. The headgate in the upper end of the loop in question has, in obedience to an order heretofore made, been removed. Hanley on his part is required

to remove the earth dam at the other end of the loop, and he is enjoined from placing any obstruction to the natural flow of water along the old channel in that part of the river. The complainant is required to put the Orphan headgate in repair and so maintain it that the diversion of water at that point shall conform to the requirements of the decree heretofore made.

The order to show cause is discharged without costs to either party.

U. S. Circuit Court, District of Oregon, filed Feb. 21, 1905.

J. A. SLADEN,
Clerk.

And, to wit, on the 1st day of April,, 1912, there was duly filed in said Court, an opinion, by the Honorable Robert S. Bean, District Judge, in words and figures as follows, to wit:

OPINION BY JUDGE BEAN.

*In the District Court of the United States for the
District of Oregon.*

PACIFIC LIVESTOCK COMPANY,
a corporation.

Complainant.

WM. D. HANLEY, ET AL.,

Defendants.

Hearing on citation to defendants Sweek, Young, Dalton and Geary to show cause why they should not be arrested for contempt, for a violation of a decree of this court rendered on December 10, 1901, in a suit then pending, brought by the Pacific Livestock Company against W. D. Hanley, et al.

Edward F. Treadwell and Teal, Minor & Winfree,
Attorneys for Complainant.

L. R. Webster, Attorney for Defendants.

BEAN, District Judge:

The decree in question was made in pursuance of stipulation of the parties, and undertook to settle the rights of the respective parties thereto to the use of the waters of Silvies River in Harney County. So far as material in this hearing, it is provided that the defendant Sweek "may maintain his dam in Silvies River where the same is now constructed and built, and may thereby obstruct the flow of the waters of Silvies River, and maintain a ditch in connection with said dam, having a capacity of not to exceed 308 miners' inches of water under a four inch pressure, from the first day of May each year to the first day of July each year, and at no other time or place and to no greater extent than as above set forth."

That "the defendant Mrs. A. E. Young and the defendant George W. Young as her agent, lessee and representative, may maintain one dam in the west fork of Silvies River where a dam is now constructed and built on the lands of the said Mrs. A. E. Young, described

as the northeast quarter of section 30, township 23 south, range 31 east, Willamette Meridian, and the ditches maintained in connection with said dam by the said defendants jointly or severally, and by means of such dam and ditches may obstruct and divert waters from the west fork of Silvies River from the 12th day of May to the 1st day of July each year in sufficient quantities and for the purpose of irrigating the lands of the defendant Mrs. A. E. Young (particularly described in the decree) and may also maintain said dam from the 21st day of July to the 23d day of July each year, both dates inclusive, and by means of said dam and the ditches aforesaid used in connection therewith, during the period last above mentioned, may divert so much of the waters of the west fork of Silvies River as may be necessary to irrigate, during the period last mentioned, such lands as said George W. Young and Mrs. A. E. Young may have in garden and orchard upon their lands above described."

And "that the defendants Green Hudspeth and James Dalton and the intervenor Harrison Kelly may jointly maintain a dam in the west fork of Silvies River in Section 31, township 23 south, range 31 east, Willamette Meridian, as the same is now maintained by them at said point, and which is commonly known as the People's Dam, and may maintain said dam from the 12th day of May to the 1st day of July each year in manner and form as the same is now maintained, and they may also maintain during such period each year a ditch extending from the said dam to the lands of the said Hudspeth, Dalton and Kelly (which are particularly de-

scribed) and by means of said dam and said ditch may during the period aforesaid use and enjoy the said waters in order to irrigate the lands above set forth and in quantities sufficient to irrigate the said lands, but the said ditch shall be so reduced that it shall have a capacity, where the water is taken from the said west fork of Silvies River, of not to exceed 1000 miner's inches under a four-inch pressure."

After thus and otherwise not material on this hearing defining the rights of the parties, the decree provides that the defendants shall be perpetually enjoined and restrained from obstructing or impeding the flow of the water to and upon the lands of the complainant, except as in the decree particularly set forth.

The dam which the defendant Sweek had in the river at the time of the decree and which he was thereby permitted to maintain was damaged about three years ago so that it could not be used, and was repaired by Sweek during the year 1910. It is charged by the complainant that it was not rebuilt the same as at the time of the decree, but that permanent boards not removable were placed across the bottom thereof to the height of about four feet, thereby causing a permanent obstruction to the flow of the water at all seasons of the year in violation of the terms of the decree. I do not think this charge is sustained by the testimony. Mr. Sweek who repaired the dam and Mr. Wallace who assisted him in doing so both testified that the old dam was not torn out but was placed in the same condition as formerly and that no change was made therein which would in

any way increase the obstruction to the flow of the water. The only evidence to the contrary is that of Mr. Foster, a surveyor who made a measurement of the Sweek dam in October, 1899, and Mr. Gilcrest, the superintendent of the complainant. Mr. Gilcrest's testimony is based on his recollection of the size and dimensions of the old dam and not upon any actual measurements thereof, and is not sufficient to overcome the positive and unequivocal testimony of Sweek and Wallace. Foster's measurements were made about two years before the date of the decree and there is no evidence that the dam was in the same condition at the time of the decree as when Foster measured it. Indeed it seems probable that it was changed shortly thereafter because the measurements of Mr. McQuinn, a competent surveyor who had occasion to measure and use the dam in the course of some work he was doing for other parties in January, 1900, correspond substantially with the dimensions of the dam as it is now constructed and in use.

At the time of the decree, Young had a dam across the river with small ditches tapping the river just above the dam and leading down on each side to his garden and orchards, and also a main ditch from the stream on the east side, a short distance above the dam and near the north line of section 30, leading east for about half a mile, through which he used water for irrigation. The charge against him is that in the year 1911, without right and in violation of the decree, he constructed a new ditch or flume on the west side of the river some distance above the dam for the purpose of diverting waters for irrigation purposes, and that after the 23d

of July of that year he suffered to remain in a dam then being used by him the removable boards in two sections thereof, thereby obstructing the flow of the water. Neither of these charges are denied. The claim of Young is that no water has ever been used through the new ditch or flume, and that he took out the removable boards from two openings in the dam on the 23d day of July and that such opening was sufficient to permit an unobstructed flow of the water.

As will be seen from an examination of the decree, Young's rights are clearly stated and defined therein. He has the right to maintain one dam in the river at the place where dam was located at the date of the decree, and the ditches then maintained in connection therewith, and by means of such dam and ditches to divert water at the times and for the purposes stated in the decree. He is perpetually enjoined and restrained from diverting water in any other way, at any other time, or for any other purpose. The construction of the new flume or ditch in 1911, if intended to be used for irrigation, was contrary to the terms of the decree. It was not one of the ditches being maintained by him at the time of its rendition. So also was his failure to remove all the removable boards from the dam after his right to use the water had ceased. It was not for him to say whether the flow of the water was obstructed by his permitting a part of the boards to remain in the dam. The complainant was entitled under the decree to have them all removed and Young could not determine the question whether it would or would not be benefitted thereby.

There is another feature in reference to Young's conduct that ought not to pass unnoticed, although it is not specifically charged as a violation of the decree in the petition filed. His dam went out in 1907. About that time or shortly before he built another dam at the expense of Hanley near his north line and some distance above the old dam, and constructed a new ditch along his north and east line and onto section 29, throwing the dirt therefrom on his side of the ditch making a levee or embankment to prevent his land from being overflowed. He used a part of the water through this ditch for irrigation and permitted the remainder to go down to Hanley's land, and this he clearly had no right to do under the terms of the decree. He claims that since the decree he has changed the character of his cultivation and uses only about 25% as much water as he did at the date of the decree, and he seems to think he had a right to permit Hanley or some one else to use the remainder without violating the decree. But, as already stated, his rights are defined in the decree. By it he is not entitled to any definite quantity of water but only sufficient to irrigate the described lands, and if by reason of a change in the character of his cultivation he now uses less water than he did at the date of the decree, he must let the surplus go down the stream as it is wont to flow, and cannot permit its use by another without violating the decree.

The owners of the Peoples' Ditch at the date of the decree were James Dalton, Green Hudspeth and Harrison Kelly. Hudspeth and Kelly have since died and their successors in interest have not been cited to appear.

Dr. Geary is a son-in-law of Kelly and his wife and her mother have succeeded to Kelly's interest. Geary was cited to appear and show cause why he should not be proceeded against as for a contempt in violation of the decree, but the evidence shows that he has exercised no control over the ditch and has no interest therein. He was the administrator of the Kelly estate from 1905 to April 6, 1907, but is in no way responsible personally for the present condition of the ditch or dams.

The charge in reference to the People's Ditch is that the dam in the river at the time of the decree has been permitted to become out of repair, so that it will not retard the flow of the water at the time the owners of the ditch are entitled to use it, without the placing of manure and other material in and around the dam, and that the headgate of their ditch has been permitted to become out of repair so that the water of the river not only flows through but under and around it, so that it does not regulate and cannot be made to regulate the flow of the water into the ditch.

These charges I think are sustained by the evidence. It is apparent from the testimony of the witnesses and especially from the photographs offered and admitted in evidence that the dam is so out of repair and in a general dilapidated condition. It should be repaired and put in good order. The headgate is also out of repair. It is impossible, in its present condition, to regulate by it the flow of the water through the ditch so that no larger quantity shall flow therein than defendants are entitled to take under the decree. It should

also be repaired and put in proper condition so as to conserve the use of the water. It appears from the testimony that during the summer and fall season and after the time the defendants are permitted to use the water, but a small quantity flows in the river, and if it is obstructed or interfered with, it will not reach the lands of the complainant and it will be without water for domestic and stock purposes. Under the decree it is entitled to the use of all the waters in the stream except such as is awarded to the other parties by the decree, and it is entitled to be protected in its rights.

The order to show cause will therefore be discharged as to defendants Sweek and Geary and they will be awarded costs. The defendants Young and Dalton, however, have failed to observe the terms and provisions of the decree, but as their violation thereof was due probably to neglect rather than to wilfulness, and as this is a civil proceeding in contempt (*Gompers vs. Buck Stove & Range Co.*, 211 U. S. 418), and no damages to complainant are shown, they may purge themselves by paying the costs.

Filed, April 1, 1912.—A. M. Cannon, Clerk.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States, for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record on the appeal of William Hanley from the decree of said court entered on August 3, 1915, in the case in which the Pacific Live Stock Company, a corporation, is complainant and appellee, and the said William Hanley and F. L. Mace, H. G. Levens, George Whiting, Thomas Whiting, Ione Whiting, John C. Foley, N. Brown, J. H. Byerly, C. P. Rutherford, C. A. Sweek, M. Cushing, D. M. McMenamy, John I. Newman, Charles Nelson, W. H. Marrs, Manna Marrs, Joseph T. Barnes, William Clark, C. H. Voegtly, George W. Young, Mrs. A. E. Young, P. G. Smith, Green Hudspeth, James Dalton, Hull Hotchkiss, Casper Luig, Mrs. F. E. McGee, Peter Clemens, B. R. Porter, and The Harney Valley Dam, Ditch and Irrigating Company, a corporation, are defendants, and Harrison Kelley is intervenor. That said transcript has been prepared in accordance with the law, the rules of the court, and the foregoing order of court designating the record for said transcript, and the stipulation of the parties, and that said transcript is a full, true, and correct transcript of the record of the proceedings had in said court in said cause upon which said decree was based in accordance with the said order and stipulation as the same appear of record and on file in my office and in my custody.

And I further certify that the cost of the foregoing transcript is \$. for clerk's fees for preparing said record, and \$. for printing said record, and that said cost has been paid by said appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Portland in said District this. day of December, 1915.

.

Clerk.